1201

SUPREME COURT, U. S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OBTOBER TERM, 1967

No. ~~1201~~ //

JOSEPH DeCESARE and RALPH BLACKBURN,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

PETITION [redacted]

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INDEX TO PETITION

	Page
STATEMENT OF JURISDICTION	1, 2
OPINIONS BELOW	2
STATEMENT OF THE MATTER INVOLVED	2, 3
QUESTIONS PRESENTED	3
REASONS OF ALLOWANCE OF THE WRIT	4, 5

INDEX TO BRIEF

STATUTES INVOLVED	5
STATEMENT OF THE FACTS	
THE INFORMATION	6
THE EVIDENCE	6, 7
ARGUMENT	7, 8, 9, 10
CONCLUSION	11
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS
CASES

	Page
Brown vs. United States, 5th Cir. 1957, 249 F. 2d 306	9
Contreras vs. United States, 5th Cir. 1954, 213 F. 2d 96, 99	9
Edwards vs. United States, 5th Cir. 1964, 334 F. 2d 360, 365 Cert. denied 1965, 379 U.S. 1000	4, 9
Farmer vs. United States, 10th Cir. 1942, 128 F. 2d 970	3
Hargrove vs. United States 5th Cir. 1933, 67 F. 2d 820	9
United States vs. Cashin, 2d Cir. 1960, 281 F. 2d 669	8
United States vs. McGonigal, D. Del 1963, 214 F. Supp. 621	9

CONSTITUTIONS AND STATUTES

	Page
United States Constitution,	
Article III, Section 2	4, 6
Sixth Amendment	4, 6
United States Code,	
Title 18, § 3109	3, 4, 5, 7, 10
Title 26, §§ 4401, 4411, 4412	2, 4, 6
Title 26, §§ 4421 (1) (c), 4421 (2)	2
Title 26, § 7203	2, 4, 6, 9
Title 28, § 1254 (1)	1

IN THE

SUPREME COURT OF THE UNITED STATES

OBTOBER TERM, 19__

No. _____

JOSEPH DeCESARE and RALPH BLACKBURN,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

PETITION AND SUPPORTING BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit affirmed the judgment of conviction on January 31, 1966. (Transcript of Record — 393). Petition for rehearing was denied on March 7, 1966. (Transcript of Record — 401).

3109, in executing the search warrant? (Transcript of Record - 395).

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embody questions of federal law which have not been, but should be settled by this Court.

2. The decision herein sustaining venue of the cause in Jacksonville, Florida, although petitioners resided in Hollywood, Broward County, Florida, in which later county they allegedly operated in the business of accepting wagers, is a violation of petitioners rights under the Sixth Amendment and Article III, Section 2 of the United States Constitution, in that they were tried in the Middle District of Florida, and not in the Southern District.

3. The decision herein convicts petitioners of the offense of willfully failing to register and pay the gambling stamp tax, an essential element of which is actual knowledge of the existence of the obligation and a wrongful intent to evade it, although there is no testimony in the record that petitioners had complied with the obligation in prior years, or had a record of prior gambling arrests, or had been forewarned to pay the tax, or were aware a federal tax was due and is in conflict with the decision of the Fifth Circuit in Edwards vs. United States, C.C.A. 5th, 334 F. 2d 360, Cert. denied, 1965, 379 U.S. 1000.

4. The decision herein is at variance and conflicts with 18 U.S.C.A. §3109 which prescribes that an officer may break open any outer door to execute a search

warrant, if after notice of his authority and purpose, he is refused admittance.

5. The decision herein appears to be in conflict with applicable decisions of this Court.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, and that the certified transcript, which has been filed herewith and duly verified by the Clerk of the Court of Appeals for the Fifth Circuit, and the judgment of that Court be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated, April 4, 1966.

Respectfully submitted,

By: _____

BRIEF IN SUPPORT OF PETITION

STATUTES INVOLVED

The Federal Statutes involved are Sections 3109 of Title 18, U.S. Code; Sections 4401, 4411, 4412, 7203 of Title 26, U.S. Code. Pertinent portions of these statutes are quoted in the appendix.

STATEMENT OF THE FACTS

The Information

The information is in one count. It charges petitioners were, between March 1, 1964 through March 24, 1964, jointly engaged in the business of accepting wagers in Broward County, Florida, and then willfully and knowingly failed to register with and pay to the District Director of Internal Revenue for the Jacksonville District the special tax as required by the provisions of Sections 4411, 4412, 4901 (a) Title 26 U.S. Code in violation of Title 26, U.S. Code, Section 7203 (TR-1)

Petitioners filed motion to dismiss and/or transfer for improper venue, jurisdiction, contending they resided in Hollywood, Florida, which is in the Southern District of Florida, and that trial in Jacksonville, Florida, which is in the Middle District, would violate their rights under Article III, Section 2 and the Sixth Amendment of the United States Constitution. (TR-3). This motion was denied. (TR-12).

The Evidence

On March 24, 1965 Special Agents of the Internal Revenue executed a search warrant on the premises at 3431 N.W. 72 Terrace, Hollywood, Florida. (TR-119).

According to petitioner De Cesare, only five seconds elapsed from the time he heard someone yell "Federal Agents" and "with a warrant" until some entered the house. (TR-163). Agent Forman testified that he smelled ordinary smoke and based on his experience believed that

evidence was being destroyed and thereupon broke into the premises. (TR-151).

Petitioners' Motion to suppress, based on Federal Statute Section 3109, Title 18 U.S. Code was denied by the Court. (TR-183).

None of the government's twelve witnesses testified that petitioners had any prior history of operating a bookmaking business. No prior arrests for gambling or related offenses were indicated. Neither petitioners were shown to have purchased the gambling stamp tax in prior years. No one testified the petitioners had been previously warned or cautioned to pay the tax. Federal Agent Forman admitted that when he asked petitioner DeCesare whether he had a gambling tax stamp he replied, "what stamp?". (TR-204).

ARGUMENT

I.

The Court of Appeals erred in holding venue was proper in the Middle District of Florida.

Rulings as to venue, we submit, should be decided in favor of permitting trial at the defendant's residence:

> "The Constitution and the Bill of Rights provide that the trial of crimes shall be held in the state where the said crimes shall have been committed.' Article 3, Section 2, Cl. 3, and before an impartial jury of the state and district wherein the crime shall have been committed. Recogniz-

> ing the unfairness and hardship which trial in an environment alien to the accused exposes him, and the important policies underlying the venue provisions of the Constitution and Bill of Rights, the Supreme Court has declared that venue statutes should whenever possible, be construed to permit trial at the residence of the Defendant. U.S. vs Johnson, 655 Ct. 250. The position taken by the government in this case is squarely contrary to this rule of construction, for it would permit the government to select the place of trial to suit its sole convenience..." United States vs. Cashin, 2d Cir. 1960, 281 F.2d 669.

The petitioners, residents of Hollywood, Florida, were arrested in that City on process issued from the Southern District Court (TR-9). An information was filed in the Middle District, in Jacksonville, some 300 miles away from petitioners residence. Their wager taking operation occurred in Hollywood. The Lower Court held that as the petitioners had to register through the District Director's office (Jacksonville) the charges should be brought and tried in the Middle District (TR-9).

The petitioners were caused to transport themselves and counsel to the distant city of Jacksonville, at heavy expense, and stand trial in an unfamiliar atmosphere, in contravention of their constitutional rights.

II.

The record was insufficient for the jury to have concluded petitioners knew of the stamp tax obligation

and willfully failed to register for and pay the gambling tax.

Petitioners were convicted under Section 7203 (26 U.S.S. §7203), which provides that:

> "Any person required under this title to pay any estimated tax or tax... who willfully fails to pay such estimated tax or tax... shall... be guilty of a misdemeanor..."

In this offense, an essential element is that of willfulness, which has been defined as "...a specific wrongful intent... actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence...". Hargrove vs. United States, 5th Cir. 1933, 67 F. 2d 820.

It was not shown that the petitioners had complied in prior years. Brown vs. United States, 5th Cir. 1957, 249 F. 2d 306. No one testified that the petitioners had been forewarned to pay the tax. Contreras vs United States, 5th Cir. 1954, 213 F. 2d 96, 99. Nor was it established that the petitioners had any long experience in the bookmaking business. Edwards vs. United States, 5th Cir. 1964, 334 F. 2d 360, 365. Unlike the Defendant Edwards in that decision neither of the instant petitioners had prior gambling arrests.

While the evidence may support an inference that the petitioners were engaged in accepting wagers, there is nothing further in the record to support the additional inference that they were aware of the wagering tax. United States vs. McGonigal, D. Del. 1963, 214 F. Supp. 621.

We submit that the evidence was insufficient to indicate that the Petitioners willfully failed to register and pay the gambling tax and the decision herein conflicts with the **Edwards** case, supra.

III.

The Court of Appeals erred in finding the search warrant was reasonably executed.

The Federal Statute found at Section 3109, Title 18 U.S. Code provides that:

> "The officer may break open any outer or inner door or window of a house or any part of a house or anything therein to execute a search warrant **if after notice of his authority and purpose, he is refused admittance** or when necessary to liberate himself..."

There are no exceptions in the statute, for example, for smelling smoke. We submit this staute is a statutory definition of reasonableness. The violation of this statute would render the search and its fruits improper.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

WE HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION was mailed to the SOLICITOR GENERAL, Attorney for Respondent, DEPARTMENT OF JUSTICE, WASHINGTON, D.C., this _____ day of April, 1966.

APPENDIX

	Page
OPINION OF THE COURT OF APPEALS	1, 2, 3
FINAL JUDGMENT OF THE COURT OF APPEALS	5
ORDER DENYING PETITION FOR REHEARING	6
APPLICABLE FEDERAL STATUTES	7

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22528

JOSEPH DeCESARE and RALPH BLACKBURN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(January 31, 1966.)

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: Appellants seek to reverse convictions for willful failure to register for and pay to the District Director of Internal Revenue the special tax required of persons engaged in the business of accepting wagers (26 USCA §§4411-12) in violation of 26 USCA §7203. None of the four attacks has any merit.

First, venue in the Middle District of Florida was obviously correct under F.R.Crim.P. 18 prescribing that "prosecution shall be had in a district in which the offense was committed * * *," and under the "general rule that where the crime charged is a failure to do a legally required act, the place fixed for performance fixes the situs of the crime." *Johnston v. United States*, 1956, 351 U.S. 215, 220, 76 S.Ct. 739, 100 L.Ed. 1097, 1101-02; *United States v. Commerford*, 2 Cir., 1933, 64 F.2d 28, 32-33, cert. denied, 289 U.S. 759, 53 S.Ct. 792, 77 L.Ed. 1502; *Evans v. United States*, 5 Cir, 1965, 349 F.2d 653, 656.

Second, under the circumstances of this record, there was compliance with 18 USCA §3109 which prescribes that "the officer may break open any outer or inner door or window of a house * * * to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance * * *." In executing the warrant, the Government Agent announced himself by knocking on the door, identified himself as a Federal Agent armed with a warrant and demanded admittance. He heard movements within and smelled smoke and, apprehending that the occupants were attempting to destroy incriminating evidence (confirmed immediately upon entry), ordered his fellow officers to break open the door, enter the premises, and arrest the appellants. Bypassing the Government's first response that §3109 may not afford a basis for suppression (see *Barrientes v. United States*, 5 Cir., 1956, 235 F.2d 116, cert. denied, 352 U.S. 879, 77 S.Ct. 102, 1 L.Ed.2d 80), the actions were entirely reasonable and satisfied §3109. See *McClure v. United States*, 9 Cir., 1964, 332 F.2d 19, cert. denied, 1965, 380 U.S. 945, ___ S.Ct. ___, ___ L.Ed. ___; *Masiello v. United States*, D.C.Cir., 1963, 317 F.2d 121.

Third, Appellant Blackburn's belated registration and payment of the gambling tax on March 31, 1964, was ineffectual to erase the charged, and proved, violations occurring between March 1 and March 24, 1964. Under 26 USCA §4901, registration for and payment of the gambling tax is a "condition precedent to carrying on" the business of accepting wagers. The tax imposed "must be paid before engaging in the business wagering." *Lewis v. United States*, 1955, 348 U.S. 419, 422, 75 S.Ct. 415, 99 L.Ed. 475, 479; *Marderosian v. United States*, 1 Cir., 1964, 337 F.2d 759, 760, cert. denied, 1965, 380 U.S. 971, ---- S.Ct. ---, --- L.Ed. --- Consequently, no help comes from *Farmer v. United States*, 10 Cir., 1942, 128 F.2d 970.

Fourth, this record was quite sufficient for the jury to have concluded beyond a reasonable doubt that Appellants knew of the obligation to register for and pay the gambling tax and willfully failed to do so. *Edward v. United States*, 5 Cir., 1964, 334 F.2d 360 (en banc), cert. denied, 1965, 379 U.S. 1000, --- S.Ct. ---, --- L.Ed. ---; *Ingram v. United States*, 1959, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503.

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22528

D. C. Docket No. 64-276-Criminal Action

JOSEPH DeCESARE and RALPH BLACKBURN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 31, 1966

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22528

JOSEPH DeCESARE and RALPH BLACKBURN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(March 7, 1966.)

On Petition for Rehearing

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled numbered cause be, and the same is, hereby DENIED.

United States Code

Title 26, §4401

"(c) Each person who is engaged in the business of accepting wagers shall be liable for and pay the tax under this subchapter..."

Title 26, §4411

"Then shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable..."

Title 26, §4412

"(a) Requirement - Each person required to pay a special tax under this subchapter... shall register with the official in charge of the internal revenue district..."

Title 26, §7203

"Any person required under this title to pay an estimated tax... who willfully fails to pay such estimated tax or tax... shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both..."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1201

JOSEPH DECESARE AND RALPH BLACKBURN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted under an information which charged them with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412 (R. 1). Each was sentenced to imprisonment for six months (R. 25-26), and the court of appeals affirmed.

The evidence showed that petitioners were engaged in the wagering business between March 1 and March 24, 1964 (R. 100-111, 255-258, 273-283), and that, on the latter date, federal agents executed a search warrant at the premises where the business was conducted (R. 119-121). Subsequently, on March 30, 1964, petitioner Blackburn registered and paid the wagering occupational tax (R. 287). On October 7, 1964, petitioner DeCesare registered and paid the occupational tax for a subsequent tax period (R. 308).

There is no merit to any of the questions raised by petitioners.[1]

1. The proper venue of the crime charged was not the residence of petitioners, but the place where petitioners failed to do the required acts. *Johnston* v. *United States*, 351 U.S. 215, 220; *United States* v. *Commerford*, 64 F.2d 28, 32-33 (C.A. 2), certiorari denied, 289 U.S. 759.

2. Although at the trial petitioners' counsel conceded that they were "bookies" (R. 345), they contend that there was insufficient evidence from which the jury could have inferred that they knew of their legal obligation to register and file a tax return. As "bookies", petitioners were intimately connected with betting and presumably well aware of the tax

[1] Petitioners do not present the issue which is before this Court in *Costello* v. *United States*, No. 826, this Term, *i.e.*, whether the occupational tax stamp provision of 26 U.S.C. 4411 and the registration provision of 26 U.S.C. 4412 violate the privilege against self-incrimination. Unlike Costello, petitioner Blackburn belatedly registered and paid the tax.

obligations imposed on wagering. In addition, the evidence showed that they attempted to destroy their records upon learning that federal officers were at the premises (R. 207-208, 218-220). In these circumstances there was sufficient proof of willfulness to support the jury's verdict. Significantly, petitioners did not raise this issue in the trial court by moving for judgment of acquittal. Rule 29, F.R. Crim. P.[2]

3. Contrary to petitioners' contentions, the officers complied with 18 U.S.C. 3109 in executing the search warrant. The officers first identified themselves and their purpose. It was only after they smelled smoke and heard movements that they broke open the door to prevent the destruction of the objects sought under the warrant (R. 138-141, 148-152, 156-159). As stated in *Masiello* v. *United States*, 317 F.2d 121, 122 (C.A. D.C.):

> * * * But the phrase, "refused admittance" is not restricted to an affirmative refusal. Indeed it would be an unusual case coming before the courts where an occupant affirmatively "refused admittance" or otherwise made his refusal known verbally after being given notice pursuant to § 3109. Where, as here, after giving the required notice the officers hear sounds which indicate to them that the evidence sought by the warrant may be in process of destruction, execution of the warrant need not be deferred long enough to allow completion of the process.

[2] At the close of the evidence Blackburn did, however, seek dismissal on the ground of his belated registration and payment of the tax (R. 295-299).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DeCESARE ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 11. Decided March 4, 1968.*

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated, and the cases are remanded for further consideration in the light of *Marchetti* v. *United States,* 390 U. S. 39. See also 28 U. S. C. § 2106 and *Grosso* v. *United States,* 390 U. S. 62.

MR. JUSTICE MARSHALL took no part in the consideration or decision of Nos. 11, 17, 19, 24, 30, and 45.

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*Together with No. 17, *Butler* v. *United States;* No. 19, *Mazzell et al.* v. *United States;* No. 24, *Rosenzweig* v. *United States;* No. 30, *Augello, etc.* v. *United States;* No. 45, *Ginnaro* v. *United States;* and No. 567, *Mutcherson* v. *United States,* all on petitions for certiorari. Nos. 17, 19, and 567 are to the Court of Appeals for the Fifth Circuit, No. 24 to the Second Circuit, No. 30 to the Third Circuit, and No. 45 to the Eighth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

NO. 17

ROBERT J. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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INDEX

Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	20
Misinterpretation of Supreme Court Decisions	21
The Importance of the Questions Presented	22
Conclusion	23
Certificate of Service	24
Appendix "A"	25
Appendix "B"	26

LIST OF AUTHORITIES

CASES	Page
Brady v. State of Maryland, 373 U.S. 83, S.Ct. 1194	23
Dillon v. United States, 307 F.2d 445 (9th Cir. 1962)	21
Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758	22
Jones v. United States, 362 U.S. 257, 273, 80 S. Ct. 725 (1960)	23
Shelton v. United States, 242 F.2d 112	21
Shelton v. United States, 356 U.S. 26, 78 S.Ct. 563	21
Walker v. Johnston, 312 U.S. 275, 286, 61 S.Ct. 574	21
Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079	22

UNITED STATES STATUTES

28 U.S.C. 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

NO._____

ROBERT J. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To The Honorable The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

ROBERT J. BUTLER, herewith respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered in this cause on May 27, 1966, affirming the conviction of Petitioner upon his plea of guilty on two counts charging violations of 26 United States Code 7203 with knowingly and wilfully failing to register with the District Director of Internal Revenue and to pay the special tax imposed by 26 United States Code, Section 4411, while being engaged in the business of accepting wagers.

OPINIONS BELOW

The District Court did not render an opinion but rendered judgment based upon a plea of guilty to the above two counts. A third count was dismissed after said plea was accepted. The opinion of the Court of Appeals for the Fifth Circuit, comprising Appendix A, infra, is not yet officially reported. Its judgment and that of the District Court are made a part hereof, and the denial of the Motion for Rehearing, on July 29, 1966, is attached as Appendix B.

JURISDICTION

This matter involves the interpretation and application of important substantive and procedural matters of Federal Criminal Law. The judgment of the Court of Appeals for the Fifth Circuit was entered on May 27, 1966. The jurisdiction of this Honorable Court is invoked under Section 1254 (1) of Title 28, United States Code.

QUESTIONS PRESENTED

Petitioner's Application for certiorari presents the following questions of law:

1) Does a conference between Internal Revenue Service Special Agents and Petitioner and a Co-Defendant without the presence of their attorney but at their request after arraignment and prior to trial, at which certain promises were made inducing pleas vitiate all subsequent proceedings which resulted in the pleas of guilty being entered?

2) Does a District Court err in accepting a plea of guilty induced in part by Petitioner's reliance upon

promises made to him by Special Agents of the Internal Revenue Service and over his attorney's objection and with full disclosures to the District Court prior to the acceptance of the plea?

3) Does a Trial Court err in overruling Petitioner's Motion to Inspect and Examine Probation Reports where said reports were the only source of confirming whether in fact agents of the Internal Revenue Service had or had not conferred with the District Judge as they promised Petitioner they would do, and which in part induced his plea of guilty?

The Court of Appeals for the Fifth Circuit, without discussion, Per Curiam held all of Petitioner's contentions in these regards without merit. Further, the Court of Appeals impliedly approved said unilateral conferences between accused and accusing agents without the presence of or dismissal, or conferring with or knowledge of Petitioner's counsel. The Court of Appeals further held that the judgment of the Trial Court "following a plea of guilty made by the Appellant in the presence of his chosen counsel after full and searching inquiry by the Trial Court . . ." was proper.

STATEMENT OF THE CASE

Petitioner in three counts was charged with knowingly and wilfully failing to register with the District Director of Internal Revenue, failing to pay said special tax to the District Director, and failing to make an excise tax return while being engaged with a co-defendant in the business of accepting wagers. He had originally entered a plea of not guilty, but with a co-defendant, after a meeting with the two special agents who had investigated his case and

arrested him, and without his attorney's knowledge, changed his plea in open court. He was thereafter sentenced to imprisonment for a period of one year and fined $2500.00 each on Counts 1 and 2, the imprisonment to run concurrently, and the payment of costs of prosecution also were assessed against him.

Prior to rearraignment the following colloquy took place: At the outset Petitioner's counsel advised the Court of the highly unusual circumstances which had taken place in the interim between the prior arraignment at which pleas of not guilty were entered and the request for rearraignment at Petitioner and his co-defendant's request.

Mr. Morgan: May we next call for arraignment, Your Honor,—this will be re-arraignment—John R. Mayfield and Robert J. Butler, Number 4303-A.

Mr. Schwartz: Your Honor, before going in to this matter, I want to make a disclosure to the Court. My clients have requested this re-arraignment. However, certain events that have been related to me have occurred in the past several months, dealing with the voluntariness, a matter that the Court would normally inquire into. I would like to call not only the clients but the two Government Intelligence agents of the Revenue Service on the point, so that the Court can decide from these facts if in fact a plea can be entered.

As I said, my clients have requested this re-arraignment; and this in no way involves Mr. Morgan's office or Mr. Seals' office. (The respective U. S. Attorneys for the Southern and Western Districts of Texas.) To my knowledge they knew and still know nothing about this other than my possibly mentioning it to Mr. Morgan on the telephone at the time I requested the re-arraignment of the clients.

Mr. Morgan: Your Honor, I think the Court can ascertain from the defendants whether or not they are entering a plea voluntarily. If there's any question about the voluntariness of that plea, I'm sure the Court would enter a plea of not guilty.

Mr. Schwartz: Your Honor, I just don't want the matter to come up later. I think the Court is entitled to know the facts, instead of their coming up, possibly, with a 2255 proceeding later. Since I am counsel for them as well as an officer of this court, I feel duty-bound to disclose this.

The clients, of course, have gone over with me the very matters which the Court and the United States Attorney will inquire about, about the voluntariness of the plea. And while they might answer those questions of the Court satisfactorily, these specific underlying facts deal with those same questions, and I think the Court—it won't take long—I think the Court should be apprised of those matters at this time to determine whether Your Honor can accept a guilty plea.

I realize that this is unusual, and that a lawyer for a defendant asking for a re-arraignment asking to disclose these facts at this time—but I think they should be made a part of the record at this time.

Mr. Morgan: May I be heard, Your Honor?

The Court: Yes.

Mr. Morgan: We would object, of course, to putting on any Government agents to let counsel purportedly prove whether his clients are voluntarily pleading guilty or not so that counsel can be taking their depositions. That's what counsel would actually be doing.

The Court: Well, what I think you ought to do is rearraign them and let the Court satisfy himself on their pleas. Let's get started.

Mr. Schwartz: That was never my intention, Your Honor. This conversation took place, as I am informed, three months ago in the office of the special agents Kelt and Sawyer, who are here in the courtroom today. I requested Mr. Sawyer to be here myself. This conversation occurred between him and my two clients without *my being present*, Your Honor. That is the specific subject matter I'd want to inquire into. Neither Mr. Morgan nor Mr. Seals nor anyone in their offices were involved in any way that I know of.

The Court: Well, if they want to be re-arraigned they can be, and I'll decide whether I'll accept their plea or not.

Mr. Morgan: Sir, is your name Robert Butler?

The Defendant Butler: Yes.

Mr. Morgan: And is your name John R. Mayfield?

The Defendant Mayfield: Yes.

Mr. Morgan: Both of you gentlemen are here in court with your attorney, are you?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Mr. Schwartz. Have both of you gentlemen been furnished copies of the charge against you?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Have you had opportunity to discuss this matter with your counsel?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: And you understand, you know what you are charged with?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Do you understand that you are charged

in a three-count information. In the first count you are charged with failing to register with the Internal Revenue Service, although you were in the business of conducting wagers, in the wagering business. Do you understand that?

The Court: Do each of you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: And that in Count Two you're charged with failing to pay the special tax levied on those engaged in the gambling occupation. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: And in the third count, that you are in the business of conducting wagers, and that you failed to make a return and pay the tax, although you were during that time engaged in the gambling business. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Do you understand that if you plead guilty to either of these counts or if you're tried and found guilty on either of these counts, the Court can assess a fine of a maximum of $10,000, or one year imprisonment or both the fine and imprisonment. Do you understand that?

Mr. Schwartz: And the costs of prosecution.

Mr. Morgan: And the cost of prosecution on each count. And do you understand that the penalty for either count may be added to the penalty on any other count?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Do you understand that?

The Court: Well, let's see here; let's be sure. I'm not

sure both answered each time. Now, Mr. Butler, do you understand fully with what you're charged?

Mr. Butler: Yes, sir.

The Court: Mr. Schwartz has advised you of what you're charged, and you have prior to this time seen a copy of the—what is it, an information?

Mr. Morgan: Yes, sir.

The Court: You've seen a copy of the information, and from the explanation Mr. Schwartz has made, you fully understand with what you're charged?

Mr. Butler: Yes, sir.

The Court: And you understand the possible punishment you could receive if you enter a plea of guilty or if on a plea of not guilty you are convicted?

Mr. Butler: Yes, sir.

The Court: Do you have any question about the charge at all, or the punishment?

Mr. Butler: No, sir.

The Court: Mr. Mayfield, do you fully understand what you're charged with?

Mr. Mayfield: Yes.

The Court: And do you understand what the possible punishment is?

Mr. Mayfield: Yes.

The Court: And it's been explained to you by your attorney of your own choice and by the United States Attorney this morning.

Mr. Mayfield: Yes.

The Court: And you received previously a copy of the information?

Mr. Mayfield: Yes.

The Court: Mr. Schwartz, are you satisfied both of them understand fully what they're charged with?

Mr. Schwartz: Yes.

The Court: And the possible punishment?

Mr. Schwartz: They definitely know that.

The Court: All right. You may proceed.

Mr. Morgan: I'll read Count One of the information.

[Thereupon Mr. Morgan read Count One of the information to the defendants.]

Mr. Morgan: To which Count One, you, John R. Mayfield, plead guilty or not guilty?

Mr. Mayfield: Guilty.

Mr. Morgan: To which Count One, you Robert J. Butler, plead guilty or not guilty?

Mr. Butler: Guilty.

[Thereupon Mr. Morgan read the second count of the information to the defendants.]

Mr. Morgan: To which second count, you, Robert J. Butler, plead guilty or not guilty?

Mr. Butler: Guilty.

Mr. Morgan: To which second count, you, John R. Mayfield, plead guilty or not guilty?

Mr. Mayfield: Guilty.

The Court: All right. Mr. Butler, I want you to pay close attention to what the Court asks you. If you have any observation, the Court wants you to make it known. Are you pleading guilty to these counts because you are guilty and for no other reason?

Mr. Butler: Yes, sir.

The Court: Are you pleading guilty because someone has threatened you, intimidated you or coerced you?

Mr. Butler: No, sir.

The Court: Are you pleading guilty because some officer, federal, state, or local, has in any way put pressure upon you?

Mr. Butler: No, sir.

The Court: Are you pleading guilty because someone

has promised you something, favor, inducement, reward, withholding of prosecution?

Mr. Butler: No, sir.

The Court: Now, your attorney has stated that you have had a conversation which may have affected your pleading voluntarily. Have you had any conversation with any officers of the Internal Revenue Service or anywhere else that in any way affected your voluntary plea of guilty?

Mr. Butler: Yes, sir; we've had a lot of conversations. They've only told me that the fact that we plead guilty, *it might be a whole lot easier than trying it; that they've got sufficient stuff on us; in other words, that we haven't got a chance.*

The Court: All right. Now, Mr. Butler, you—

Mr. Butler: And that the Court *might be more lenient with us.*

The Court: Well, now, the Court cannot accept that plea with that understanding that the Court will be more lenient, because you cannot enter a plea of guilty unless you understand fully that you do not have to plead guilty—

Mr. Butler: Well, they cited a few cases for us, you know. They actually didn't promise us anything; I want you to know that. Cases that's come before you in the last year or two, or the last year. And they brought those up with the possibility that there might something along that line happen to us.

Mr. Schwartz: Your Honor, I can name the cases that they refer to, since they were before Your Honor, and since an associate of my office appeared in them at one stage. The cases they mentioned were United States vs. Freddie Harrison and Tommy Stutz, which Your Honor might recall. They were three defendants charged jointly and pled guilty without an attorney, and I think Mr.

Hensley of my office appeared sometime in October of last year. They eventually received suspended sentences without supervision. And that was the specific thing that was mentioned to them, allegedly, Your Honor, by these agents. I want to make it clear, Your Honor, that I have apprised the clients that the Court is bound to no one, not the Government nor us, in any way, and doesn't know of these things in any way; and I think it's improper on the part of the special agents to talk to people who they knew were represented by an attorney for over a year. I've appeared of record for these people, Your Honor, since the date they were arrested, at the Commissioner's hearing, and months later before Judge Allan Hannay of Houston on a motion to suppress, and every proceeding thereafter. And with knowledge of those facts, these agents, without informing me, had these conversations with them. And that is the reason I made the statement I did at the outset, Your Honor. Again I'll repeat that Mr. Morgan's office nor Mr. Seals' office knew anything more than I did about this.

Mr. Morgan: Your Honor, I'm not as familiar, probably, as counsel is about what happened. I think if the Court will inquire he'll find out that these two people went to the Government agents on their own.

Mr. Schwartz: That is correct, Your Honor. They requested the meeting, the conversation, first with Mr. Sawyer at his home and then at their office. That is absolutely correct.

The Court: All right. Now, Mr. Butler and Mr. Mayfield, the Court wants to advise you, first of all, that he cannot accept a plea of guilty from you unless it's voluntary, unless you make it freely and voluntarily. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

The Court: The Court cannot accept a plea of guilty from you if you're making it because of the conversation had with these agents. Now, the Court's going to advise you that the Court has had other cases besides those to which they have referred, and you'll find that there has been no pattern. The Court does not accept recommendations from either the Government or the United States Attorney's office or the Internal Revenue Service on cases of this nature. He did this morning where somebody violated the Interstate Commerce Act regulations, but he does not in cases of this nature. Therefore, if you're relying in any way upon any statement made to you by these officers in entering a plea of guilty the Court cannot accept it. As a matter of fact, the Court's going to advise you and advise you very carefully that he's had a number of cases of this nature, and the cases since then have not been handled in that manner. The Court, very frankly, in that case you mentioned today, had just come here—the Court's going to be very frank with you—the Court had just come here and had never handled a case of that sort, and thought that a fine with a year was too long, and changed his mind about it. But he has not done it since. The Court found out that by reason of that action that in every case of this nature that's come up the defendant thought that if he had followed the same course he'd get a change in his sentence, so the Court's been very careful to pronounce sentence after studying a probation officer's report and being sure that that is what the report indicated he should do. So the Court wants to advise you that your plea must be voluntary, that if you're relying upon anything that any officer has told you, he cannot accept

your plea, whether it's a promise or a threat or any pressure at all. Now, do you understand that, Mr. Butler?

Mr. Butler: Yes, sir.

The Court: Do you understand that, Mr. Mayfield?

Mr. Mayfield: Yes.

The Court: If you're relying upon any suggestion to you that this Court would be any more lenient with you if you enter a plea of guilty than if you were found guilty after entering a plea of not guilty, the Court cannot accept your plea. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes, sir.

The Court: All right. Now, the Court has advised you. Do you fully understand what the Court's saying? Mr. Butler, do you understand the Court will not accept a plea of guilty from you if you're relying upon any promise made to you by anybody? Do you understand that?

Mr. Butler: Yes, sir.

The Court; Or any suggestion to you. Are you relying on the suggestion to you that the Court would be easier on you?

Mr. Butler: No, sir. I understand.

The Court: Alright. Now, I'm going to ask you some questions. I want you to answer me honestly now, because the Court's going to make a determination right now whether you fully understand and are competent, because if later on you want to do something about it—the Court thinks you're competent to understand. No question about that, is there?

Mr. Butler: None whatever.

The Court: All right. The Court's going to give you every opportunity now to answer these questions. All right, Mr. Butler. Do you plead guilty freely and voluntarily of your own free will?

Mr. Butler: Yes, sir.

The Court: Do you plead guilty because you are guilty of what you are charged with?

Mr. Butler: Yes, sir.

The Court: All right. Do you plead guilty because of a promise made to you by anybody connected with the Government?

Mr. Butler: No, sir.

The Court: If there has been such a promise, do you plead guilty realizing that that promise means nothing?

Mr. Butler: No, sir.

The Court: I mean you realize the promise means nothing.

Mr. Butler: Yes, sir, I understand.

The Court: Are you pleading guilty because somebody has threatened you or intimidated you or coerced you in any way?

Mr. Butler: No.

The Court: Are you pleading guilty because of an indication that this Court would be easier on you or would follow the history of some other case?

Mr. Butler: No.

The Court: If that suggestion was made to you, do you realize it will be of no benefit to you?

Mr. Butler: Right.

The Court: And disregarding this, you plead guilty in view of the warning given you by this Court?

Mr. Butler: Yes, sir.

The Court: All right. Is there any pressure, direct or indirect, by anybody, the Government, the lawyer, or anybody else, that's leading you to plead guilty?

Mr. Butler: No, sir.

The Court: Now, Mr. Butler, are you pleading guilty voluntarily and of your own free will?

Mr. Butler: Yes, sir.

The Court: With full knowledge of what the Court has pointed out to you?

Mr. Butler: Yes, sir.

The Court: And regardless of any suggestions, promises, or threats anybody has made to you?

Mr. Butler: Yes, sir.

The Court: All right. The Court's going to accept your plea, Mr. Butler, and finds you guilty as charged.

Mr. Mayfield, are you pleading guilty voluntarily and of your own free will?

Mr. Mayfield: Yes.

The Court: Are you pleading guilty because you are guilty?

Mr. Mayfield: Yes.

The Court: Are you pleading guilty because of some suggestion, promise, or indication made to you by an official of the Government that this Court would be easier on you?

Mr. Mayfield: No.

The Court: Or that he'd follow this history of some other case?

Mr. Mayfield: No.

The Court: What is your answer?

Mr. Mayfield: No, sir, I'm not. No indication.

The Court: All right, sir. Are you pleading guilty because of some pressure, direct or indirect, in some other prosecution or in this one?

Mr. Mayfield: No, sir, no pressure, not any place. I'm pleading guilty because I am guilty.

The Court: And you understand what the Court has pointed out to you?

Mr. Mayfield: Yes, sir.

The Court: All right, Mr. Mayfield. The Court accepts your plea and finds you guilty as charged.

As is the Court's custom, the Court will study the probation officer's report and will call you back for sentencing and give you an opportunity to make any representations to the Court before sentencing.

Now, Mr. Schwartz, do you have any further recommendations to make to the Court?

Mr. Schwartz: No, Your Honor. Any other facts related to me would be accumulative of the ones already related to the Court.

The Court: Are you fully satisfied with the caution that the Court has given the defendants?

Mr. Schwartz: Yes, sir. I don't see how anything more can be done.

The Court: All right.

(R. 210-226)

Thereafter a motion for a new trial and to set aside guilty pleas and motion to suspend the sentence were filed on June 23, 1965 (R. 335-339), and overruled (R. 331). The testimony of Petitioner Butler was in virtual direct conflict with that of the two special agents except on the following pertient points. That on the night of February 23, 1965, that he and co-defendant Mayfield had met with Special Agents Sawyer and Kelt in the latter's office, Room 5308 New Federal Building, Houston (R. 290). Mayfield instigated the call (R. 290, 242) because Mayfield was "nervous and upset and had been unable to work with this charge hanging over his head . . ." (R. 243-290)

Sawyer was not in when the message was left, but returned the call and Butler answered it and the meeting was arranged for that evening at the Federal Building.

The Agents' testimony that they were there without their attorney is undisputed (R. 243). Butler acknowledged his attorney was not there (R. 295) and did not know in advance that his clients were going there. (Page 300).

Mayfield, testified in the wake of a probated sentence, "I appreciate the Court's leniency to me and that my action in the future and conduct prove that" (R. 270). He acknowledged that both he and Butler were reluctant to tell their own attorney what went on at the meeting and hesitated to tell him about it (R. 283).

Other than the duration of the meeting (20-30 minutes) (R. 272, 248) there was a complete divergence of opinion on the following critical matters with Mayfield's memory largely failing him, e.g. (R. 271-282).

Butler amplified upon the matters about which the Court had been earlier advised prior to rearraignment, including the following: Three prior cases in which guilty pleas had been entered and jail terms given in the morning but probated that evening by the same then District Judge were mentioned, Gilliam, Harrison and Stutz. (Although Sawyer did acknowledge that Butler asked about the latter two) (R. 244).

According to Butler they advised him that these three Defendants only got "a fine and one year non-reporting probation." (R. 291). They did not mention any case where time to serve had been imposed under a 7203 case including specifically the case of James J. French (R. 291-292).

Sawyer, after citing these cases, said, "In all likelihood, since we are first offenders (sic), this is what we could

get. I mean likely, in all likelihood that's what we would get, and then we went on talking about A&M which both of the Agents are from." (R. 292).

Butler knew Agent Kelt, who had caddied for Butler and Kelt's father (R. 293). Agent Sawyer advised them that they had no chance to beat their case (R. 293).

Agent Kelt advised that he had become a lawyer on account of the District Judge sitting and that he, when requested to do so by Butler, would give the Judge a good character reference, that he had always been a good citizen of College Station and so on (R. 294).

The Agents, concluding, reiterated, "We haven't promised you anything, but you know you can look at these cases and tell that first offenders, they are rather lenient with them." (R. 294). Although Butler, semantically mistaking what is a promise and what is not in acknowledging that no promises were made (R. 311), was placed under a hypnotic Svengali trance by the following irresistible inducements in addition to those above: That Gilliam and Stutz had said something to him about Sawyer making them similar promises (R. 295), which later turned out to be true.

Sawyer further represented that Defendants would not have to plead to over two, and possibly only one Count (R. 296). The former turned out to be true (R. 232). He and Sawyer took each other into their confidence (R. 296).

He relied on what Sawyer and Kelt told him in deciding to plead guilty (R. 299). On cross examination Butler admitted that he was "not exactly telling the Court the

truth at the time of his arraignment" (R. 303) but in explanation he felt "like that I was the first offender, going back to this meeting, that I certainly wouldn't be put in jail" (R. 304). Even as the United States Attorney repeated verbatim the colloquy supra, at the time of the rearraignment, the appellant related "it was in the back of my mind it would still be all right" (R. 307). He still remembered these conversations and hoped that what they said was going to be true (R. 309). His hope was based upon the conversation and conference of February 23, with the agents (R. 318-319). Appellant and his co-defendant had been advised that they had possible defenses, that their counsel was recommending trial and was not in fact charging any additional fee for the trial (R. 297).

The Agents denied and contradicted most if not all the latter statements by Butler.

After the overruling of Petitioner's First Motion to Reduce or Suspend Sentence the day after imposition of sentence, he thereafter filed Motion to Inspect and Examine the Probation Department reports (R. 350-351), which was overruled on August 11, 1965 (R. 354).

Motions for the return of property illegally seized and/or to suppress same originally filed in Houston, Texas, the place of seizure on December 20, 1963, were likewise filed on June 27, 1964, in the Western District, Austin Division (R. 166, et seq., 192-193). Except for the contents of a safety deposit box containing $13,000.00 in currency, Petitioner's Motion to Suppress was overruled on March 25, 1964 (R. 193, 194). After the overruling of Motion for New Trial and to set aside guilty pleas and to reduce or suspend sentences, supra, Notice of Appeal was duly perfected.

REASONS FOR GRANTING THE WRIT

Over 90% of the criminal cases brought in the Federal Courts are ultimately disposed of upon pleas of guilty.* The meeting between Internal Revenue Service's Special agents and defendants, even if at the latter's request is illegal, unethical, and should be condemned. This is doubly apparent when offers to give the sentencing judge a good character reference on Petitioner (R. 294), of his purported leniency with first offenders of which Petitioner was one (R. 294) and the promise which was ultimately fulfilled that he would not have to plead to the third count (R. 296, 232) are inconsistent with due process of law and are a sporting theory of justice or injustice.

Although the Special Agents knew that Petitioner and his co-defendant had been represented by the same counsel since the hour after their arrest at the Commissioners' hearing, and at the prior arraignment in the United States District Court, they disregarded this in readily accepting Petitioner's request to confer with him in their offices in the Federal Building at night. Both Petitioner and his co-defendant, were nervous, unable to sleep at night and worried (R. 279, 271, 233).

In addition, after the promises of the Agents were not fulfilled, Petitioner through his counsel resorted to the only avenue available to determine whether or not one particular promise, that of the sentencing Judge being given a good character reference on Petitioner was fulfilled. Petitioner does not submit that generally and unlimitedly a Defendant in a criminal proceeding in the United States District Court

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*See e.g. Annual Report of the Federal Bureau of Investigation J. Edgar Hoover, dealing of course with cases on which the FBI has jurisdiction, which comprise a good portion of federal cases.

is now entitled to see carte blanche and meet and refute evidence contained in a probation report and concedes that hearsay and otherwise inadmissible testimony may be contained therein. However, this is a different matter from the District Court denying Petitioner and his Attorney access to the report and records from the Probation Report to see if in fact the promise of the Agent was fulfilled.

These holdings, it is respectfully submitted, are either in direct conflict with or misinterpret the decisions or principles emanating from this Honorable Court, particularly in the past decade. They are novel questions vital to the proper administration and adjudication of Federal Criminal Law, because they are present in the overwhelming number of cases.

MISINTERPRETATION OF SUPREME COURT DECISIONS

With respect to the determination that Petitioner's plea was voluntary, the principles and language enunciated by this Court in *Walker v. Johnston*, 312 U.S. 275, 286, 61 S.Ct. 574; *Shelton v. United States*, 356 U.S. 26, 78 S.Ct. 563; as well as the decision originally enunciated in that case below, *Shelton v. U.S.*, 242 F.2d 112, after which the Solicitor General of the United States confessed error to the majority opinion, at 246 F.2d 571 of the Court of Appeals for the Fifth Circuit sitting en banc while the case was pending in this Court.

With respect to the request for the Probation Report the particular issue clearly presented there has not been presented in this Court but is in complete conflict with the decision in *Dillon v. United States*, 307 F.2d, 445 (9th Cir. 1962). It is respectfully submitted that it is not

at variance with the general principles announced by this Court in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, although Petitioner does not acquiesce that the general principles enunciated therein are now sacrosanct and cannot be reexamined 17 years later in light of the monumental remolding of the principles of due process by this Honorable Court.

THE IMPORTANCE OF THE QUESTIONS PRESENTED

Whether or not a guilty plea should be accepted, especially after full disclosure by the counsel for defendant prior to the Court's accepting the plea of guilty, is one in which form has been allowed to govern in this case rather than the substance. Petitioner, an uneducated bookmaker, unaware of the semantics of the words and ritual being followed, continually and consistently asserted that he was given no promises when in fact, when specifically questioned, did point out the rankest sort of promises made by Agents without his attorney's knowledge or presence, to induce his plea of guilty. As a matter of law no plea of guilty could have been accepted under the circumstances which had arisen in this case. Especially is this so in view of the disclosure by Defendant's counsel that he had valid defenses. By then the urging was too late. He was under the spell of the very persons seeking to prosecute him. Surely this is a most critical stage of the proceedings. Compare *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758.

In a State proceeding, this Honorable Court has commendably held that suppression of evidence favorable to an accused upon request violates due process "where the evidence is material either to guilt or to punishment . . .

irrespective of the good or bad favor the prosecution." *Brady v. State of Maryland*, 373 U.S. 83, S.Ct. 1194. Is this requirement at least not equally applicable to the Court itself, especially a United States District Court?

The encroachments upon delicate and valuable constitutional privileges are not subtle in the record of this case. They are of breathtaking proportions. Petitioner sought limitedly to determine if in fact the special agents did what they promised him they would do with respect to putting in a good word for him with respect to his character with the District Court. He relied that they would do so. Yet Butler here is not confronted by the names, identity, or more importantly even the stories, hearsay though they be, of the faceless, nameless citizens of the Probation Department and informers and what they had to say, for or more importantly, against him. This question is now squarely presented for this Honorable Court to decide. See concurring opinion in *Jones v. U.S.*, 362 U.S. 257, 273, 80 S.Ct. 725 (1960).

CONCLUSION

Petitioner respectfully submits that his guilty plea should be set aside because it was involuntary as a matter of law. Further, that assuming such plea to have been voluntarily entered, he had the right to be given the probation report either in its entirety as a matter of constitutional right to confrontation and due process and with which to rebut or confirm the Special Agent's promises to him but is also as a matter of confirmation of the Agent's promises. For either or both of these failure, this cause, it is respectfully submitted, must be reversed and remanded for a new trial, or alternately, for the granting of the motion with respect

to the examination of the Probation Department Report, and resentencing.

Respectfully submitted,

NEWTON B. SCHWARTZ
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that three copies hereof have been served upon the United States of America by mailing them in a duly stamped, properly addressed envelope this 9 day of August, 1966, to Hon. Woodrow Seals, United States Attorney, 515 Rusk at Smith, Federal Building, Houston, Texas, and one copy upon the Solicitor General of the United States, Department of Justice, Washington, D.C.

NEWTON B. SCHWARTZ,
MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES.
500 Branard, Houston, Texas
Attorney for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,774

ROBERT J. BUTLER, *Appellant,*
versus
UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Western District of Texas.

(May 27, 1966.)

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

PER CURIAM: The judgment of the trial court, following a plea of guilt made by the appellant in the presence of his chosen counsel after full and searching inquiry by the trial court, and the sentence are AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

Room 408 - 400 Royal St.
New Orleans, La. 70130

OFFICE OF THE CLERK

July 29, 1966

Re: No. 23055 - Robert J. Butler vs.
United States of America

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
Edward W. Wadsworth, Clerk

Mr. Newton B. Schwartz
Attorney at Law
Houston, Texas

Mr. James R. Gough,
Assistant U. S. Attorney
Houston, Texas

SUPREME COURT, U. S.
FILED
AUG 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

NO. 495 17

ROBERT J. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

NEWTON B. SCHWARTZ,
MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES.
100 Bernard, Houston, Texas
Attorney for Petitioner

Alpha Law Brief Co., [illegible], Houston, Texas 77002

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 23055

ROBERT J. BUTLER, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

---

(May 27, 1966)

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

PER CURIAM: It appears, in light of the affirmance this day of the case of *Butler v. United States*, No. 22774, that this case is now moot.

The appeal is DISMISSED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 23,055
22,774

ROBERT J. BUTLER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

---

(July 29, 1966)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22774

D. C. Docket No. 4303-A-Criminal Action

ROBERT J. BUTLER, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Western District of Texas

---

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 27, 1966

Issued as Mandate:

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 23055

D. C. Docket No. CTD 63-287

ROBERT J. BUTLER, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

---

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

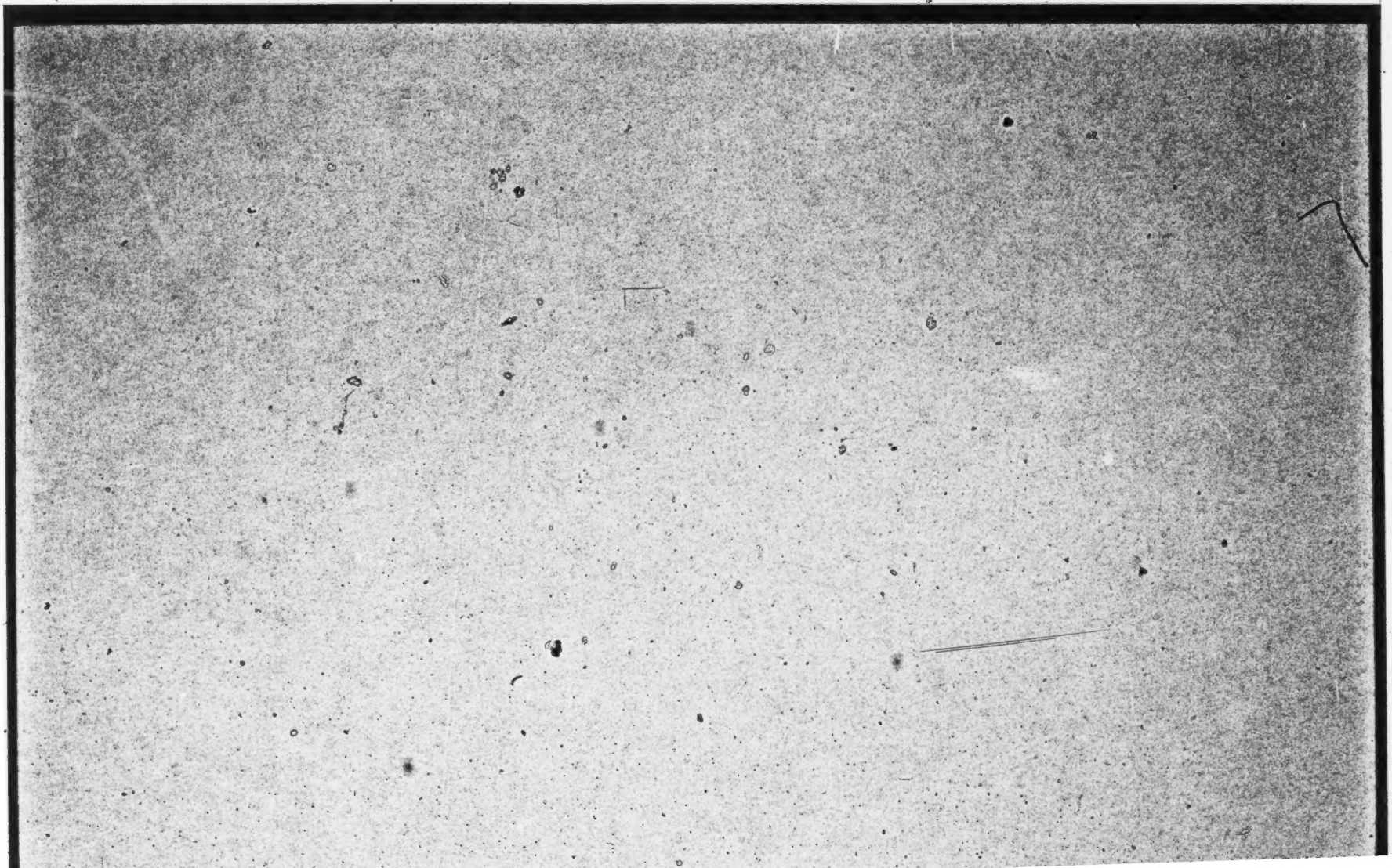
JUDGMENT

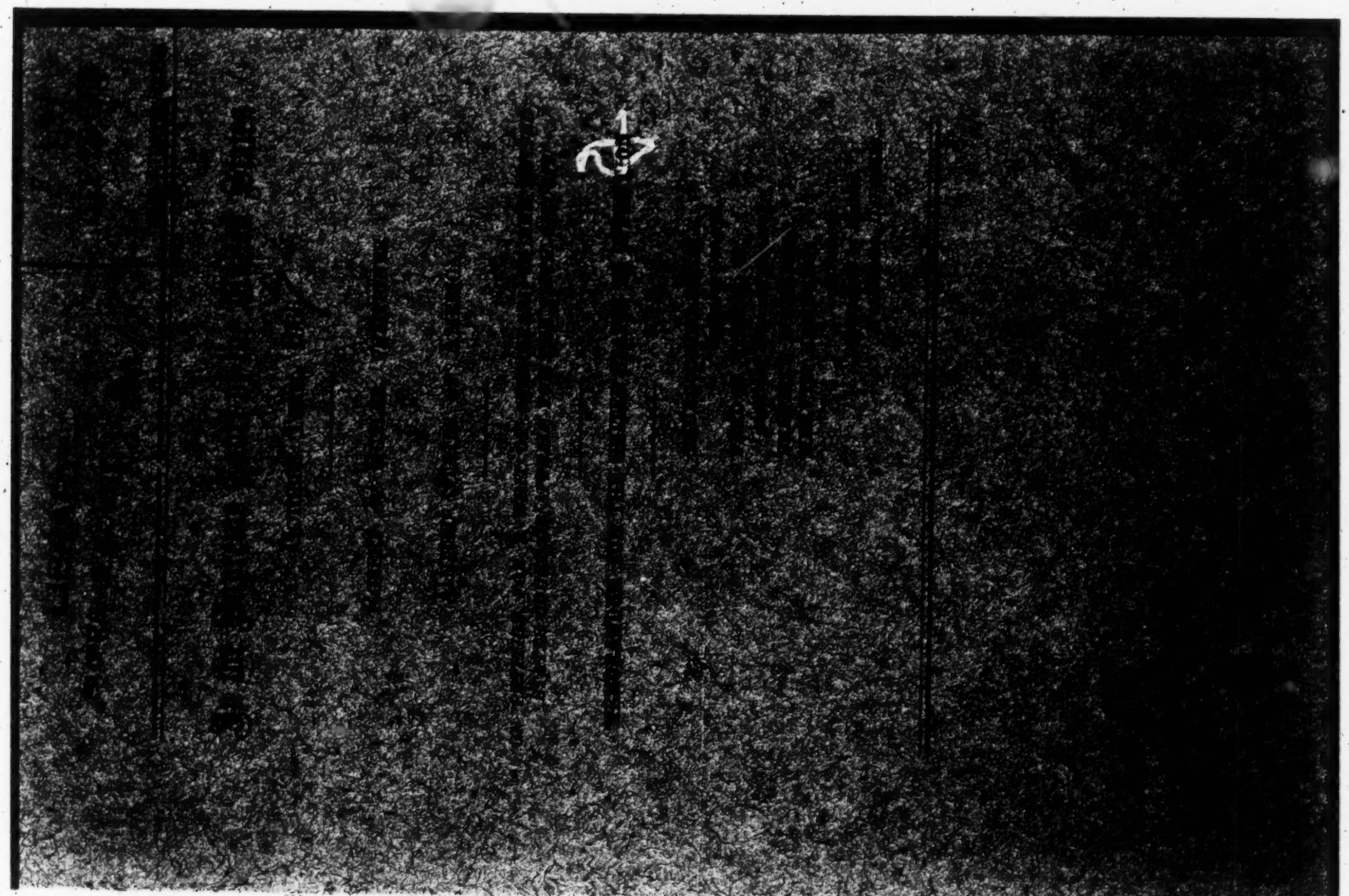
This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that appeal in this cause be, and the same is hereby, dismissed.

May 27, 1966

Issued as Mandate: Aug 9, 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 495

ROBERT J. BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 3, 1965, petitioner and his co-defendant, John Mayfield, pleaded guilty to two counts charging violations of the wagering tax statute, 26 U.S.C. 7203. Petitioner was sentenced to concurrent terms of imprisonment for one year and fined $2,500 on each count, the fines to run consecutively. The court of appeals affirmed *per curiam*, 361 F. 2d 220.

1. Petitioner and his co-defendant, Mayfield, were first arraigned on June 29, 1964. Through retained counsel they entered pleas of not guilty to three counts of violating the wagering tax statute (R. 204–208). Subsequently, both defendants advised their attorney that they desired to change their pleas.

282-780—66——1

Counsel then learned of a meeting that had been held by both defendants with two Internal Revenue Agents, Sawyer and Kelt, out of his presence and without his knowledge. At a hearing on June 3, 1965, defense counsel informed the court of this meeting and suggested that the matters discussed there might taint the pleas which his clients were about to enter (Pet. 4, R. 210).[1] The court decided to re-arraign the defendants, and a thorough examination of both was conducted before their guilty pleas were accepted (Pet. 6–16, R. 212–226).[2] At the close of the hearing, the court asked defense counsel whether he was satisfied with the procedure and had any recommendations. Counsel indicated his satisfaction that all of the pertinent facts had been fully disclosed, and stated, "I don't see how anything more can be done" (Pet. 16, R. 226).

On June 23, 1965, petitioner appeared before the court for sentencing. Although counsel urged the court to place petitioner on probation, the court sentenced petitioner to a fine and imprisonment (R. 229–232). The same day counsel orally moved to set aside the guilty plea, asserting that it had been induced by representations of the two Internal Revenue Agents. On June 24, the court conducted a hearing at which

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[1] The transcript of the hearing has been reprinted in its entirety in the petition, pp. 4–16. "R." refers to the record filed with the Clerk of this Court.

[2] At the re-arraignment hearing, the defendants were asked to plead only to the first two counts (Pet. 9, R. 217). At the subsequent hearing on the sentence, count 3 was dismissed (R. 232).

testimony was elicited from agents Sawyer and Kelt and from both defendants.

The agents stated that on February 23, 1965, petitioner and Mayfield contacted Sawyer by telephone and asked to see him (R. 242). Sawyer arranged to meet both defendants later that evening at the Federal Building in Houston, and invited agent Kelt to be present (R. 242, 264). At the meeting Sawyer asked the defendants why their attorney was not present. Petitioner replied that he and Mayfield were aware of their right to counsel but preferred that their attorney not be present and that the agents not reveal to counsel that this meeting had occurred (R. 243, 279). The defendants then remarked that the case was troubling them and that they desired to plead guilty (R. 243). Sawyer replied that the case was in the hands of a United States Attorney, and that he could not assist them. Petitioner inquired about the sentence. Sawyer stated that the type of sentence is within the sole discretion of the judge, and that the agents do not make recommendations to him (R. 244). Petitioner mentioned the names of two men who he knew had pleaded guilty to similar charges and had received suspended sentences, and asked Sawyer whether such a sentence was possible in his case if he changed his plea. Sawyer told petitioner that each case was different, and cited another wagering tax case where the accused had received a three-year prison term (R. 244). Petitioner then stated that he could not stand a probationary period, but would rather get a stamp and continue his opera-

tion, which he could not do while on probation (R. 244–245).[3]

Petitioner's version of the discussion was that the agents offered to aid him in obtaining a lenient sentence if he changed his plea (R. 291–319). The agents denied that they offered to intercede in any way, or that they led petitioner to believe that as a first offender he would receive a lenient sentence upon a plea of guilty (R. 246–247, 255, 256, 268, 272–279). Co-defendant Mayfield corroborated the agents' testimony (R. 264–289), and told the court that he had indicated to petitioner that he disliked "this business of claiming that these agents had made some promise to you," because the claim had no substance (R. 280–281). At the conclusion of this testimony the court denied petitioner's motion (R. 328).

Petitioner's claim that his guilty plea was based upon inducements by special agents of the Internal Revenue Service is founded exclusively upon his own interpretation of the testimony at the post-sentencing hearing. The facts as found by the courts below with ample support in the record show clearly that petitioner's claim is groundless. See *Koolish* v. *United States*, 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *Mount* v. *United States*, 333 F. 2d 39 (C.A. 5), certiorari denied, 379 U.S. 900.

2. Two weeks after the court imposed sentence and denied petitioner's motions to set aside the guilty plea

[3] After his first arraignment, petitioner purchased a tax stamp and to the time of trial continued to pursue his bookmaking occupation (R. 252).

or to reduce the sentence, petitioner submitted to the court a motion to inspect and examine the reports of the probation department (R. 350). This motion was denied (R. 353). Petitioner contends that, although the denial was consistent with this Court's decision in *Williams* v. *New York,* 337 U.S. 241, due process requires a re-examination of the principles enunciated there. However, the reasoning of the Court in *Williams*—that in deciding upon the proper sentence the court may look to any source it deems reliable—is as valid today as when it was first announced. There is no sound reason for denying the sentencing court access to confidential materials not a matter of public record, and broad discretion to determine whether the material received in confidence should be disclosed. See *Williams* v. *Oklahoma,* 358 U.S. 576; *Powers* v. *United States,* 325 F. 2d 666 (C.A. 1); *United States* v. *Durham,* 181 F. Supp. 503 (D.D.C.), certiorari denied, 364 U.S. 854.[4]

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[4] Rule 32(c)(2) of the amended Rules of Criminal Procedure, effective July 1, 1966, is consistent with *Williams.* It provides:

> (c) Presentence investigation—
>
> (2) Report. * * * The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity *to* the defendant or his counsel to comment thereon. * * * [Emphasis added.]

Dillon v. *United States,* 307 F. 2d 445 (C.A. 9), relied on by petitioner, holds only that when the district court orders a hearing under 28 U.S.C. 2255 to determine whether an indigent's guilty plea was induced by prosecutor misrepresentations, the court should grant a request for appointment of counsel. In that case, it appeared that the government attorney had promised the defendant that, if asked, he would recommend to the judge, and suggest in the presentence report, that a maximum sentence of ten

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

SEPTEMBER 1966.

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years' imprisonment be imposed. The court of appeals held that it was relevant to inquire as to how often judges and probation officers obtain specific recommendations from the United States Attorney's office, whether such recommendations are customarily included in presentence reports, and whether one was included in defendant's report. The court held that the defendant, without the benefit of counsel, could not effectively pursue this issue at the hearing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~6556~~ 19

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF

WILLIAM W. JUDGE
115 South Palmetto Avenue
Daytona Beach, Florida
and
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122 Madison Avenue
Daytona Beach, Florida
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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Argument	9
Proof of Service	19
Appendix A . . . Opinion and judgment below	20
Appendix B . . . Order denying rehearing	22
Appendix C . . . Stay of mandate	23

CITATIONS

HARRIS v. UNITED STATES, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1397	17
McKNIGHT, et al v. UNITED STATES, (USCA DC) 183 F. 2d 977	9, 14-16
UNITED STATES OF AMERICA v. LEFKOWITZ, 285 U.S. 452, 76 L.Ed. 877	10, 16
UNITED STATES v. RABINOWITZ, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653	9

STATUTES

Title 28 U.S.C.A. Section 1254, sub-section 1	2
Rule 38, Revised Rules of the Supreme Court of the United States	2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

NO. _____

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, James Milford Brazzell, Israel Seawood, Luther Lee Smith, Theodore Roosevelt Goggins, Acordy St. Clair Rimes and Ida Marie Sharpe, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the cause entitled: "James Milford Brazzell, Israel Seawood, Luther Lee Smith, Theodore Roosevelt Goggins, Acordy St. Clair Rimes and Ida Marie Sharpe vs. United States of America" No. 22,669

of the docket of said Court, which judgment was entered on the 27th day of June, 1966 (Record II., Page 518), and as to which a rehearing was denied on the 13th day of September, 1966 (Record II., Page 524).

CITATION TO OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in this case was rendered on the 27th day of June, 1966 (Record II., Page 514).

JURISDICTION

The judgment of the Court of Appeals, Fifth Circuit, was entered on the 27th day of June, 1966, and timely application for rehearing was filed on the 18th day of July, 1966 (Record II., Page 519). Rehearing was denied by said Court on the 13th day of September, 1966 (Record II., Page 524, and stay of mandate was granted through the 13th day of September, 1966.

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254, sub-section 1, and Rule 38 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

DID THE FEDERAL OFFICERS, UPON THE PRETEXT OF ARREST WARRANTS, EFFECT ENTRY INTO 636 PALMETTO STREET, EUSTIS, FLORIDA, FOR THE PRIMARY PURPOSE OF A GENERAL SEARCH AND SEIZURE, CONTRARY TO LAW?

STATEMENT OF THE CASE

In November 1, 1962, HONORABLE BRYAN SIMPSON, United States District Judge for the Middle District of Florida, issued a search warrant, directed to Special Agent FRED SCHILLING, or any other Special Agent of the Internal Revenue Service, Treasury Department of the United States of America, authorizing and directing a search of the dwelling house of one of the Appellants herein, LUTHER LEE SMITH, located at 715 Palmetto Street, in the City of Eustis, Florida, in the Middle District of Florida (see Government's Exhibit No. 13 and Record 149-150). The mentioned search warrant was executed on November 10, 1962, at which time certain gambling paraphernalia and money was seized from the dwelling of Appellant, LUTHER LEE SMITH (see return to search warrant attached to Government's Exhibit No. 13).

The search warrant above referred to recites the substance of its supporting affidavits made by one JESSE S. BURROW, LEWIS McCALL and Special Agent FRED SCHILLING, purporting to show probable cause to believe Appellant, LUTHER LEE SMITH, was using his home place at 715 Palmetto Street, Eustis, Florida, as the means of conducting certain criminal offenses in violation of pertinent Wagering Excise Tax Laws of the United States of America, to-wit: "Cuba" or "Bolita." The original affidavits for this search warrant were attached to the search warrant admitted in evidence (see Government's Exhibit No. 13).

On the same date that the above mentioned search warrant was issued, that is, November 1, 1962, HON-

ORABLE BRYAN SIMPSON, upon complaint of Special Agent FRED SCHILLING, issued at least two arrest warrants, one for Appellant, LUTHER LEE SMITH, and the other for Appellant, ISRAEL SEAWOOD, in which each of them was charged with Federal wagering, stamp and excise tax lottery sales violations (see Government's Exhibits Nos. 14 and 15).

On November 10, 1962, and elaborate surveillance apparatus and organization was set up by Special Agent FRED SCHILLING, together with a number of Federal and State officers in Eustis, Florida, and close attention was paid to observing the home of Appellant, LUTHER LEE SMITH, at 715 Palmetto Street, Eustis, Florida. It came to the attention of Special Agent FRED SCHILLING that Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, and others, had left 715 Palmetto Street and converged upon and went into a dwelling house located at 636 Palmetto Street in Eustis, Florida. Special notice is drawn to the fact that Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, were observed by the offioers as they left 715 Palmetto Street and went to and entered 636 Palmetto Street, along with others. Further special attention is directed to the fact that Special Agent FRED SCHILLING was not personally acquainted with Appellant, LUTHER LEE SMITH, or Appellant, ISRAEL SEAWOOD (Record 199). Apparently Special Agent FRED SCHILLING depended upon information given him by Undercover Agent LEWIS McCALL, who allegedly had purchased Bolita tickets from them, for information necessary to identify Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD.

Special Agent FRED SCHILLING, accompanied by Undercover Agent LEWIS McCALL, went to the front door of the dwelling located at 636 Palmetto Street; other Federal and State officers accompanied them. They entered after knocking and announcing themselves as "Federal officers" and that they "had warrants." Upon entry of the home at 636 Palmetto Street, in Eustis, Florida, Appellants, LUTHER LEE SMITH, ISRAEL SEAWOOD, JAMES MILFORD BRAZZELL, one CARL D. PURSER and one ARTHUR MARTIN, were arrested. PURSER and MARTIN died pending subsequent prosecution (Record 21). Gambling, lottery, paraphernalia, money, and other personal property were seized by the officers at the time of the search of 636 Palmetto Street, as a purported incident to the lawful arrest of Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD.

Following the raid at 636 Palmetto Street in Eustis, Florida, the officers then proceeded to 715 Palmetto Street, the home of Appellant, LUTHER LEE SMITH, and executed the search warrant there at a time when Appellant, LUTHER LEE SMITH, was in custody of the officers. The search of the home of Appellant, LUTHER LEE SMITH, at 715 Palmetto Street, produced further articles of gambling, lottery, paraphernalia and monies, all of which were seized.

Subsequently, sometime in 1963, PURSER, MARTIN, BRAZZELL, LUTHER LEE SMITH, RIMES, BROOKER, NELSON, BETHEL, SHARPE and GOGGINS were indicted by the Grant Jury of and for the Middle District of Florida, being case No. 62-32-Cr-Oc, in which all of the Defendants were, in the First Count, charged with conspiracy with violation of pertinent lottery

wagering statutes proscribed in and by Title 26, United States Code (see Supplementary Record 26). Later that Indictment was voluntarily dismissed by the Government and the instant Indictment, case No. 64-6-Cr-Oc, was returned by a Grand Jury for the Middle District of Florida, Ocala Division, on March 17, 1964, and containing 14 Counts (Record 1, et seq). The present Indictment charges, in the First Count, all of the Appellants here and the then living CARL D. PURSER and ARTHUR MARTIN, with conspiracy to violate Section 371, Title 18, United States Code, by wilfully engaging in the business of accepting wagers knowingly and wilfully attempting to evade and defeat the special occupational tax; failing to pay the occupational tax to the District Director of Internal Revenue; failing to register with the District Director; attempting to conceal from the proper officers of the United States their being engaged in the business of accepting wagers, all in violation of Title 26, United States Code, Section 7201, and other substantive offenses, proscribed in and by Title 26, United States Code, Sections 7201 and 7202.

Counts Two, Three and Four of said Indictment charged PURSER with substantive offenses against the Lottery Excise Tax Laws of the United States; Count Five likewise charged ARTHUR MARTIN with such substantive violations. Counts Six to Fourteen, both inclusive, are identical in form and specifically charge the respective individual Defendants, Appellants here, to-wit: BRAZZELL, SEAWOOD, LUTHER LEE SMITH, GOGGINS, RIMES, BROOKER, NELSON, BETHEL and SHARPE, with the substantive offense of receiving wagers as defined by Section 4421, Internal Revenue Code of 1951, for and on behalf of a

person subject to the excise tax imposed by Section 4401 of said Internal Revenue Code on persons engaged in the business of accepting wagers, and wilfully and knowingly attempting to evade and defeat the special occupational tax by failing to register with and failing to pay the said occupational tax to the District Director of Internal Revenue, and attempting to conceal their alleged business of receiving wagers on behalf of a person subject to the excise tax imposed by Section 4401 of said Internal Revenue Code, in violation of Title 26, United States Code, Section 7201 (see Record 1, et seq).

By Stipulation, Motions to Dismiss the Indictment, Motions for Return of Seized Property and to Suppress Evidence, Motions for Bills of Particulars, and Motion for Discovery and Inspection, directed to the first Indictment, were permitted to stand over and be addressed to the instant Indictment (Supplementary Record 26). The individual Motions to Dismiss are found beginning at page 1 to page 13, both inclusive, of the Supplementary Transcript of Record. All of the Defendants joined in moving to dismiss the First Count, the conspiracy count, for the causes and reasons therein stated (see Supplementary Record 13).

Two Motions for Return of Seized Property and to Suppress Evidence were filed. The first was presented by Appellant, LUTHER LEE SMITH, and is particularly concerned with and challenges the validity of the search warrant authorizing the search of SMITH'S home located at 715 Palmetto Street in Eustis, Florida (see Supplementary Record 15). The second Motion, for return of seized property and to suppress evidence, was filed by the original Defendants, PURSER, MAR-

TIN, BRAZZELL, SEAWOOD and SMITH, the latter three being the only living Defendants, Appellants here. This Motion to Suppress asserts that the search of 636 Palmetto Street is in violation of law in that the same violated the right of said Appellants, guaranteed to them under the Fourth Amendment to the Constitution of the United States of America to be free from unreasonable searches and seizures as proscribed in the Fourth Amendment, and because the Federal officers knowingly, wilfully and deliberately utilized purported arrest warrants as a pretext for a general search of said premises contrary to law (see Supplementary Record 17).

The Motions to Dismiss and to Suppress were all denied by the Trial Judge.

The trial came on to be heard before HONORABLE WILLIAM A. McRAE, without a Jury; Jury trial being appropriately waived (see Record 24, et seq), on the 17th day of February, 1965, at Jacksonville, Florida.

Upon the close of all the evidence, the Defendants moved the Trial Judge to suppress all of the Government's exhibits introduced and filed in evidence (Record 48, et seq), and after considerable argument the Trial Judge entered his Order denying said Motions (Record 455). Thereupon the Trial Judge entered judgments and commitments finding the Defendants, Appellants here, BRAZELL, SEAWOOD, SMITH, GOGGINS, RIMES and SHARPE guilty as charged under the First Count, the conspiracy Count, and sentenced them, and each of them, to a year and a day (Record 458, et seq).

On May 31, 1965, Appellants, BRAZZELL, SEAWOOD, SMITH, GOGGINS, RIMES and SHARPE filed their respective Notices of Appeal to this Honorable Court from the United States District Court for the Middle District of Florida (Record 467, et seq). Appellants were allowed bail pending appeal (Record 473, et seq).

The United States Court of Appeals, Fifth Circuit, on June 27, 1966, by Per Curiam opinion (Record II., Page 514), held that the search and seizure following entry by the Federal officers into 636 Palmetto Street, was incidental to lawful arrest, and cited: *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653).

It was the contention of Petitioners, in and by their Petition for Rehearing (Record II., Page 519), that the Court of Appeals, Fifth Circuit, erroneously failed to apply the rule laid down in *United States v. Rabinowitz, supra,* and in *McKnight, et al v. United States,* (USCA DC) 183 F. 2d 977), in the particulars specifically set out in grounds two and three of the Petition for Rehearing (Record II., Pages 521-522).

ARGUMENT

DID THE FEDERAL OFFICERS, UPON THE PRETEXT OF ARREST WARRANTS, EFFECT ENTRY INTO 636 PALMETTO STREET, EUSTIS, FLORIDA, FOR THE PRIMARY PURPOSE OF A GENERAL SEARCH AND SEIZURE, CONTRARY TO LAW?

The evidence of the Government itself affirmatively

discloses that the entry by Federal officers into 636 Palmetto Street, Eustis, Florida, upon purported authority of arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, was in truth and in fact a pretext for or, in the alternative, was primarily for the purpose of, effecting a general search of 636 Palmetto Street without a search warrant, contrary to law.

To begin with, though the factual circumstances are dissimilar, the case of *United States of America v. Lefkowitz*, 285 U.S. 452, 76 L.Ed. 877, is positive authority for the proposition, as stated by Mr. Justice Butler in the last paragraph of that decision of the Supreme Court of the United States, that:

> "An arrest may not be used as a pretext to search for evidence."

It is necessary briefly to recount the circumstances involved. It will be recalled that the search warrant and the arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, were issued by the HONORABLE BRYAN SIMPSON, United States Judge, on November 1, 1962 (see Government's Exhibits 13, 14 and 15, and Record 149-150).

Any casual reading of the testimony of Special Agent FRED SCHILLING, commencing at page 123 of the Record, will clearly show that he, together with a number of other officers, Federal and State, had conducted, prior to November 1, 1962, an intensive investigation and surveillance in Eustis, Florida, designed and organized to apprehend a lottery operation that was being conducted in that area. According to the

search warrant, the investigation referred to had its beginning sometime during the month of September 1962, and it continued progressively until November 1, 1962, when the search warrant and the arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD were obtained. It is obvious that for reasons which Special Agent FRED SCHILLING deemed necessary in order to effect the arrest of as many of the parties involved as possible, the arrest warrants were deliberately left unexecuted for some 10 days. In other words, it is plain that the Government agents certainly were in no wise prevented from arresting Appellants, LUTHER LEE SMITH or ISRAEL SEAWOOD during the interim period between November 1st and November 10th, 1962. But, when the officers were in position and location at various vantage points on November 10, 1962, and in communication with each other by radio, it developed that their quarries were not going to assemble at 715 Palmetto Street, the home of LUTHER LEE SMITH, Appellant, but instead were going to 636 Palmetto Street, a dwelling house some distance away from the home of Appellant, LUTHER LEE SMITH. This, of course, presented to Special Agent FRED SCHILLING, who apparently was in charge of the array of police officers involved, what he considered to be an emergency, that is to say, the plans he had laid so carefully for the search of 715 Palmetto Street went awry.

It should be pointed out and clearly understood that there was nothing to prevent Special Agent FRED SCHILLING, and his officers, from arresting Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD *before* they reached 636 Palmetto Street, or to prevent him from executing the search warrant at 715 Palmetto

Street before going to 636 Palmetto Street. Special Agent FRED SCHILLING simply did not choose to follow that course. It is also to be noted that in view of the long standing surveillance and investigation under the supervision of Special Agent FRED SCHILLING, the Government's evidence discloses absolutely no reason why the "emergency" which confronted him on November 10th was not resolved by the simple process of delaying springing his trap until he obtained a search warrant for 636 Palmetto Street, just as he had done in the case of the search warrant for LUTHER LEE SMITH'S home at 715 Palmetto Street.

The purpose of mentioning the foregoing circumstances is to point up and emphasize the irresistible conclusion that Special Agent FRED SCHILLING resolved to utilize the arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, for the purpose of entering 636 Palmetto Street and "Catching" all of those whom his officers informed him had gathered there. To say that Special Agent FRED SCHILLING was not primarily concerned with entering and searching 636 Palmetto Street and arresting all of its inmates is to defy all of the circumstances the record in the case at bar so clearly show (Record 193).

First of all, Special Agent FRED SCHILLING was not acquainted with and could not identify Appellants, LUTHER LEE SMITH or ISRAEL SEAWOOD, himself (see Record 199). He, Special Agent, FRED SCHILLING, was, therefore, required to depend upon his undercover informer, Agent LEWIS McCALL, in order to identify the two men for whom he possessed arrest warrants. Consequently, LEWIS McCALL accom-

panied Special Agent FRED SCHILLING to the front door at 636 Palmetto Street (see Record 198). He, SCHILLING, then knocked on the door, and claims he identified himself and stated that he possessed arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD. The point is, however, and this is the crucial one, since Special Agent FRED SCHILLING could not identify either of the Appellants, LUTHER LEE SMITH or ISRAEL SEAWOOD, he obviously was compelled and required to have the door opened for the purpose of permitting his undercover agent McCALL to identify or point out LUTHER LEE SMITH and ISRAEL SEAWOOD to him. There is no escaping the fact that Special Agent FRED SCHILLING depended upon information funnelled to him that Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD had entered 636 Palmetto Street, and since he himself could not identify them, it became absolutely necessary for Special Agent FRED SCHILLING to have his informer McCALL at his side to identify Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, in order to execute the warrants he possessed.

One of the occupants, ARTHUR MARTIN, now dead, opened the door and upon inquiry by Special Agent FRED SCHILLING as to the whereabouts of Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, MARTIN pointed to a man standing in the kitchen (see Record 201). Thereafter, of course, the raid was accomplished, the search made, the lottery paraphernalia and equipment seized, and PURSER, now dead, and Appellants, BRAZZELL, SMITH and SEAWOOD were arrested (Record 196-199).

The conduct of Special Agent FRED SCHILLING, and the other officers, was a blatant and flagrant disregard of the constitutional rights of the Appellants, BRAZZELL, SMITH and SEAWOOD, under the Fourth Amendment. We think the unconscionable violation of the Fourth Amendment to the Constitution of the United States by the Federal officers at 636 Palmetto Street, is controlled by the case of *McKnight, et al v. United States*, 185 F. 2d 977 (U.S.C.A.D.C.), and the case therein cited. The only difference between *Mcknight* and the case at bar is that in *McKnight* the officers broke in after they had knocked at the door, but the circumstance of breaking the door was not the controlling factor which destroyed the legal efficacy of the search and seizure in *McKnight*. The United States Court of Appeals for the District of Columbia in *McKnight* said this:

> *"The police planned to and did reject a convenient present opportunity to make a lawful arrest in a public street* and, without a search warrant or enough information to get one, broke into a house in order to seize evidence they hoped to find there. They found it and seized it. *We think this is a plain violation of the prohibition in the Fourth Amendment of the Constitution against unreasonable* searches and seizures. The government argues that what it aptly calls a 'police strategem,' waiting until McKnight was in a locked house before arresting him, justified the police in breaking into the house in order to arrest him and seize evidence. We think this untenable. 'The right to break open a door to make an arrest requires something more than the mere right to ar-

rest.' The government concedes that even when officers have a warrant of arrest they may not break open doors unless there is some degree of necessity. To execute the warrant for McKnight's arrest there was no necessity to break open doors; or, what comes to the same thing for legal purposes, none but what the officers themselves created. *As in the case of Accarino, 'It would appear that the officers deliberately let him get to his own front door before they attempted to approach.* If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers.' Neither policemen nor private citizens can justify breaking into a house, or other violence, by deliberately creating an alleged necessity for it. Since McKnight's arrest was accomplished by a needless and violent invasion of a private house, it was illegal, *particularly since the real purpose of the invasion was not an arrest but a search.*

"The Supreme Court has specifically held that 'An arrest may not be used us a pretext to search for evidence.' United States v. Lefkowitz, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L. Ed. 877, 85 A.L.R. 775. In upholding the search in the Harris case the Court pointed out that it was not 'a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some

> crime.' Harris v. United States, 331 U.S. 145, 153, 67 S.Ct. 1098, 1102, 91 L.Ed. 1397. *It is settled law that 'when it appears, as it does here, that the search and not the arrest was a pretext for or at the most an incident of the search,' the search is not reasonable within the meaning of the Constitution.* Henderson v. United States, 4 Cir., 12 F.2d 528, 531, 51 A.L.R. 420," (italics supplied).

In the case at bar it is fatuous to say, just as it was in *McKnight, supra*, that Special Agent FRED SCHILLING did not reject a convenient present opportunity to make a lawful arrest in a public street. He purposely declined that opportunity; he wanted Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, to gather with the others inside the house where he suspected a lottery check-up would be in progress so that he could enter and search the dwelling. Just as in *McKnight, supra*, the Government in the case at bar argued that Special Agent FRED SCHILLING used a 'police strategem' by permitting Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, to enter 636 Palmetto Street before he undertook to execute the arrest warrant. Just as in *McKnight, supra*, it is crystal clear that Special Agent FRED SCHILLING deliberately permitted and allowed Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, to enter 636 Palmetto Street before he resolved to approach it and enter it upon the pretext of executing his arrest warrants.

In *McKnight, supra*, the Court there particularly made reference to *United States v. Lefkowitz, supra*, and as the quotation from the opinion in *McKnight, supra*, states, law-enforcement officers entering prem-

ises ostensibly for the purpose of making an arrest but in *reality* for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime, is in violation of the Fourth Amendment to the Constitution of the United States, as held in *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1397, cited in *McKnight, supra*.

It is interesting to note that when counsel was arguing this very point to the Trial Judge below (Record 423) the Trial Judge asked counsel for Appellants the following question:

> "Suppose the search as well as the arrest were equally significant and important; then where do we end up?"

Counsel for Appellants answered the Trial Judge's question by saying:

> "My position would be this, Your Honor. That if it were possible that there could be two co-equal propositions that it ought to be, and necessarily must be, resolved against the Government, because of the necessity . . . and the academic requirement that the Government, or any other governmental agency, when it undertakes to make a search, and even if it be an aspect of their purpose, must satisfy the constitutional requirements or suffer the consequences." (Record 424).

The Trial Judge, of course, disagreed with counsel for Appellants. We think he was fundamentally wrong.

We insist that the Trial Judge was in grave error because there are absolutely no factual circumstances in the evidence adduced by the Government to dispute the fact that Special Agent, FRED SCHILLING, was not concerned with arresting Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, but was primarily concerned with effecting an entrance into 636 Palmetto Street for the purpose of making a search. On the contrary, every single facet of the evidence discloses beyond peradventure that the only purpose of Special Agent FRED SCHILLING in going to 636 Palmetto Street at all was to enter and search it, and he used the fiction of an arrest warrant to do that which the mandate of the Fourth Amendment to the Constitution of the United States plainly and unequivocally denies to him.

Of course, without the search and seizure made in 636 Palmetto Street, and the fruits it produced, together with the search of 715 Palmetto Street and its fruits, the Government would have had no case and necessarily there could have been no conviction.

CONCLUSION

We respectfully submit that the conviction of the Appellants before this Honorable Court is predicated solely and only upon the utilization of evidence procured and seized by Government agents in direct and flagrant violation of the Fourth Amendment to the Constitution of the United States, and the Petition for Certiorari should be granted.

Respectfully submitted,

WILLIAM W. JUDGE
115 South Palmetto Avenue
Daytona Beach, Florida
and
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122 Madison Avenue
Daytona Beach, Florida
Attorneys for Petitioners

PROOF OF SERVICE

I HEREBY CERTIFY that I am counsel for Petitioners in the foregoing Petition for a Writ of Certiorari, that I am a member of the Bar of the Supreme Court of the United States and that on this day I served copies of the foregoing Petition for Writ of Certiorari upon the Solicitor General of the United States, and upon the District Attorney for the United States District Court, Middle District of Florida, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La., October _____, 1966.

Of Counsel for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22,669

D. C. Docket No. 64-6-Criminal Action

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 27, 1966

*William Harold Cox
United States District Judge
for the Southern District of
Mississippi, sitting by designation.

APPENDIX B

(738a) Cox

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,669

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Middle District of Florida

(September 13, 1966)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

PER CURIAM.

The appellants petition for rehearing in reliance upon *United States v. Rabinowitz*, 339 US 56, 70 S.Ct. 430, 94 L.Ed. 653 and *McKnight v. United States*, 183 F.2d 977 is without merit under the totally different

facts and circumstances in this case and is, therefore, DENIED.

*William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22,669

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate

of this Court in said cause be and the same is stayed for a period of thirty days from September 13, 1966, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from September 13, 1966, there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from September 13, 1966, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ HAROLD COX
United States District Judge.

Dated: Sept. 20, 1966

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 656

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES, and IDA MARIE SHARPE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 514-516) is reported at 363 F.2d 374. The opinion on rehearing (Pet. App. 22-23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1966 (R. 518). A petition for rehearing

was denied on September 13, 1966 (R. 520-524). The petition for a writ of certiorari was filed on October 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a seizure of gambling paraphernalia, incidental to the arrest of two petitioners under valid arrest warrants, was proper.

STATEMENT

Petitioners were convicted in the Middle District of Florida of conspiracy to violate the federal wagering tax laws and all except Brazzell of a substantive offense. On May 21, 1965 each was sentenced to imprisonment for one year and one day (R. 458-465). As to Mrs. Sharpe all but three months of the sentence was suspended, to be followed by probation for two years (R. 465-466). On appeal (R. 467-472) the convictions were affirmed (R. 518).

The evidence showed that in September 1962 a police officer in Eustis, Florida received information from a confidential informer as to the existence of a "Cuba" or "bolita" numbers operation in Lake County, Florida (R. 41). On several dates during October 1962, surveillance of petitioner Smith's house at 715 Palmetto Street (in Eustis) revealed that paper bags and cigar boxes were regularly being carried into the house at about noon (R. 42-58). Internal Revenue agents were given this information (R. 67). After the names of certain numbers sellers

had been ascertained, a federal undercover agent made "buys" from a number of them, including petitioners Smith (R. 72-74, 76-77), Goggins (R. 77-80), Mrs. Rimes (R. 80-83), Mrs. Sharpe (R. 89-92), and Seawood (R. 100-102). As a result of the investigation, warrants were obtained for the search of the premises at 715 Palmetto Street and for the arrest of Seawood, Smith, Goggins, Mrs. Rimes, Mrs. Sharpe and several others (R. 165-167).

The agents planned to execute the search warrant on November 10 at about noon, when, according to the prior observations, the "check-up," i.e., meeting of participants in the scheme, occurred. However, on that day, surveilling agents noted that Smith and Seawood had gone to 636 Palmetto Street (R. 174-175). At about 2:00 p.m., Schilling, the agent in charge, together with the agent who had made the "buys," went to the premises at 636 Palmetto Street to execute the warrants of arrest for Seawood and Smith (R. 175-176, 199, 225). When arrested, Smith was standing at a table in the kitchen upon which there were pads and two adding machines (R. 178-180). Seawood was found hiding in a closet (R. 202, 379). Brazzell, Martin and Purser, who were at the premises, were also arrested (R. 186). The agents seized the two adding machines and numerous bags of coded lottery slips, some of which were in the living room (R. 182-185, 328). The lottery slips showed sales of numbers by various of the petitioners (R. 330, 333-336, 342-343). At about 4:00 p.m. that afternoon Smith was taken from 636 Palmetto to 715 Palmetto, where an agent served him

with a copy of the search warrant and searched the house. A box containing gambling paraphernalia (Gov. Ex. 20) was seized there, and was subsequently introduced in evidence (R. 207-211). Schilling, the Internal Revenue agent in charge of the federal investigation, testified that he did not execute the search warrant for 715 Palmetto Street at the time originally planned because there was no activity there, and that he "* * * wanted to make sure that—if I served the Warrant, I wanted to make sure that the checkup was taking place * * *" (R. 193).

ARGUMENT

In their petitions for rehearing in the court below and for certiorari in this Court, petitioners argue that, since the agents who had warrants for the arrest of Seawood and Smith could have arrested the two men before they entered the premises at 636 Palmetto Street, the delay in executing the arrest warrants invalidated the arrests and the seizures incidental thereto. The agents were not, however, required to execute the warrants of arrest at the first possible opportunity. It was not unreasonable for them to make the arrest at a time and place which would be most likely to reveal the nature of the scheme and the existence of possible confederates. *Carlo* v. *United States*, 286 F.2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *United States* v. *Lane*, 230 F.Supp. 950, 953 (S.D.N.Y.) There was no general exploratory search for evidence such as that condemned in *United States* v. *Lefkowitz*, 285 U.S. 452. Here the adding machines and gambling paraphernalia seized were in open view, and no "search" for them was necessary.

See *Davis* v. *United States*, 327 F.2d 301, 305 (C.A. 9). Thus, petitioners' basic argument—that the entry into the 636 Palmetto Street premises to execute the arrest warrants was in fact a pretext for effecting a general search of these premises without a search warrant—is without substance. *McKnight* v. *United States*, 183 F.2d 977 (C.A.D.C.), relied on by petitioners, involved not only a delayed arrest but a forcible entry without announcement of purpose.[1] Here there was a valid arrest warrant, validly executed at a place where the men to be arrested were known to be. The fact that the agents had a search warrant for another premises does not mean that they could not make any seizures at the place where they made the arrests.[2] The seizure was incidental to those valid arrests, and was thus plainly proper. *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145; *Leahy* v. *United States*, 272 F.2d 487 (C.A. 9), certiorari dismissed, 364 U.S. 945.[3]

---

[1] In denying a petition for rehearing, the court below found petitioners' reliance on *McKnight* "without merit under the totally different facts and circumstances in this case * * *" (Pet. App. 22-23).

[2] Otherwise, the government would in effect be penalized for having taken the step of obtaining a search warrant for the other premises.

[3] Unlike petitioners in *Costello* v. *United States*, No. 41, this Term, and the related cases presently pending on petitions for certiorari, petitioners in this case do not assert any Fifth Amendment questions as to the constitutionality of the wagering tax laws under which they were convicted; nor did they preserve their right to do so by raising such questions in the courts below.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
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NOVEMBER 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~745~~ 24

SAM ROSENZWEIG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	5
Reasons for Granting the Writ	8
Conclusion	11
Appendix A—Opinion of United States Court of Appeals	A1
Appendix B—Judgment of United States Court of Appeals	A4

Authorities Cited

Cases

Flint v. Stone Tracy Co. (1910), 220 U.S. 107, 55 L. Ed. 389	10
United States of America v. Calamaro (Third Circuit), 354 U.S. 351	8, 9
Von Baumbach v. Sargent Land Co. (1916), 242 U.S. 503, 61 L. Ed. 460	11

Statutes

	PAGE
26 USC 4401	3, 8
26 USC 4411	2, 3, 5, 6, *passim*
26 USC 4412(a)	2, 4, 6, 8, 11
26 USC 4421(A)	8
26 USC 7203	4, 6
26 USC 7262	5
28 USC 1254(1)	2

Federal Rules of Criminal Procedure

Rule 51	5

Miscellaneous

H.R. Rep. No. 586, 82nd Cong., 1st Sess. 1951 (1951 U.S. Code Cong. & Admin. Serv. Vol. 2, p. 1839)	9
Sen. Rep. 781, 82d Cong., 1st Sess. 1951 (1951 U.S. Code Cong. & Admin. Serv. Vol. 2, p. 2091)	9

IN THE

Supreme Court of the United States

October Term, 1966

No.

SAM ROSENZWEIG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The petitioner, Sam Rosenzweig, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered October 4, 1966.

Opinions Below

The opinion of the Court of Appeals (App., *infra*, A-1) has not yet been officially reported. The opinion of the District Court is reported at F. Supp.

Jurisdiction

The judgment of the Court of Appeals was entered on October 4, 1966 (App., *infra*, A-4). The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

(1) Whether a collector or pick-up man, who picks up money from bettors on a weekly basis, after the event has taken place is subject to the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a).

(2) Whether a collector or pick-up man who picks up money from bettors, on a weekly basis, after the event has taken place, and occasionally may give a telephone number or code name of an answering service to a friend or possible bettor is subject to the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a).

(3) Whether a collector or pick-up man who has no control of the employees of an answering service which accepts names and telephone numbers of people and pays no bills of the answering service becomes a principal and required to comply with the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a) if ultimately these people who left their names and telephone numbers are called back by some other person and a bet or wager is accepted.

(4) Whether a collector or pick-up man who has no control of persons who receive names and telephone numbers from an answering service and which persons later through the use of these names and telephone numbers obtain bets or wagers is required to comply with the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a).

Statutes Involved

TITLE 26, UNITED STATES CODE, SEC. 4401
SEC. 4401 IMPOSITION OF TAX

(a) WAGERS:

There shall be imposed on wagers, as defined in Sec. 4421, an excise tax equal to 10 percent of the amount thereof.

(b) AMOUNT OF WAGER:

In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) PERSONS LIABLE FOR TAX:

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

TITLE 26, UNITED STATES CODE, §4411
§4411 IMPOSITION OF TAX

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section

4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

TITLE 26, UNITED STATES CODE, §4412

§4412 REGISTRATION

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

TITLE 26, UNITED STATES CODE, §7203

§7203 WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined

not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

TITLE 26, UNITED STATES CODE, SECTION 7262

§7262. VIOLATION OF OCCUPATIONAL TAX LAWS RELATING TO WAGERING—FAILURE TO PAY SPECIAL TAX

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 51

EXCEPTION UNNECESSARY:

Exceptions to rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of any objection does not thereafter prejudice him.

Statement

Petitioner was indicted as one engaged in the business of accepting wagers on horse races and failing to pay the special tax imposed by Title 26 USC Sec. 4411 Internal Revenue Code of 1954, in violation of Title 26 USC 7262 (Count 1) and with failing to supply and register his name and place of residence with the District Director of Internal Revenue as provided in Title 26 USC 4412(a) Internal

Revenue Code of 1954, in violation of Title 26 USC Sec. 7203 (Count 2).

Petitioner waived a trial by Jury.

In order to determine whether 26 USC 4411 and 26 USC 4412(a) require the payment of the special tax and registration by petitioner, it is necessary to examine the manner in which the bets or wagers on horse races were placed. The evidence produced by five (5) witnesses called by the respondent indicates the following:

The operator or principal, the one to whom the profits from the operation belong and who controls the set-up, is commonly referred to as the "banker" or "bookmaker" and his place of business as the "bank" or "horse rooms". Among those employed by the banker are the "answering service" which receives names and telephone numbers, "writers" who obtain names and telephone numbers from the "answering service" and make the calls to obtain a bet or wager and collectors or pick-up men who once a week collect the bets or wagers or pay the winnings after the events have taken place.

The player does not come into contact with the bank or banker or with the writer in placing his wager or in collecting his winnings or paying his bet or wager. Instead, he is visited once a week after the racing events have taken place to either receive his winnings or pay the sum bet or wagered.

The witnesses testified they would call a telephone number and an answering service would take their names and telephone numbers (R 9). That later in the day some person, not the petitioner, would call and the witnesses would place a bet or wager (R 9, 56, 80).

That at the end of the week the petitioner would either pay them money or collect money from them (R 16, 17, 58, 94).

The petitioner had no control over the employees of the answering service nor did he pay the rent or its telephone bills (R 190).

The petitioner had no control over the people that obtained the names and telephone numbers from the answering service in order for said persons to call and obtain the bet or wager (R 190).

The petitioner did not make application for any of the phone numbers used by the respondent's witnesses (R 190). Did not know the names of the horses upon whom bets were placed, nor the tracks where the horses were running (R 191).

Petitioner moved for judgment of acquittal contending that respondent failed to establish that petitioner, Sam Rosenzweig, was engaged in the business of accepting wagers on horses; that petitioner ever made a profit or loss from the wagers and that petitioner had been connected with the voice on the telephone.

Upon the foregoing evidence, petitioner was found guilty of both counts and fined $2000.00 on the first count and sentenced to one year in jail, sentence suspended and placed on probation for one (1) year.

The Court of Appeals affirmed the judgment of conviction.

Reasons for Granting the Writ

(1) The decision below was in direct conflict with the Third Circuit's decision in *United States* v. *Calamaro,* where the defendant who was a "pick-up" man of slips was held not to be a person engaged "in the business of accepting wagers and of conducting a wagering pool".

(2) There is a difference of opinion amongst the offices of the United States Attorney as to whether a collector is subject to the provisions of Title 26 USC Sec. 4411 and Title 26 USC Sec. 4412(a). The United States Attorney in this case argues that the petitioner who is the person who collects the proceeds of a wager or bet after the event has taken place must comply with the provisions of the USC above cited, while the United States Attorney in his brief in the case of *United States of America* v. *Calamaro* (Third Circuit), 354 U.S. 351, stated:

> "Upon examination of the act, it appears clear that the wager is not placed with the person who collects the wager from the patron, but is placed with the principal, that is the person who accepts the wager".

The tax which is involved in this case was added as one part of a comprehensive scheme to tax the receipts derived from the business of gambling.

Section 4411 USC requires each person, who is liable for the tax under Section 4401 USC or who is engaged in receiving wagers for or on behalf of any person so liable, to pay an excise tax equal to 10 percent of the amount thereof.

A wager is defined in Section 4421(A) and includes a wager placed in connection with horse racing. The said Section defines a wager as follows:

> "Any wager with respect to sports event or a contest placed with a person engaged in the business of accepting such wagers."

The petitioner was charged in the indictment as being "engaged in the business of accepting wagers on horse races and failed to pay the special tax imposed by Section 4411, Title 26, Internal Revenue Code of 1954."

The petitioner was charged as being the principal, i.e., the banker.

In H.R. Rep. No. 586, 82nd Cong., 1st Sess. 1951, the following statement appears (1951 U.S. Code Cong. & Admin. Serv. Vol. 2, p. 1839):

> "A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account . . ."

A similar statement is contained in Sen. Rep. 781, 82d Cong., 1st Sess. 1951 (1951 U.S. Code Cong. & Admin. Serv. Vol. 2, p. 2091).

The petitioner was at most a collector—an employee—rather than the person engaged in accepting wagers on horse races as a principal, he did not "accept wagers" within the meaning of the statute.

The Court held in *United States* v. *Calamaro,* 354 U.S. 351, decided June 17, 1957:

> "In normal usage of familiar language 'receiving wagers' is what someone on the 'banking' side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other. [The court here referred to the definition of 'wager' contained

> in § 3285 (b) (1) (C); note 1, supra.] Before the pick-up man enters the pictures, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well. The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to 'receiving a wager.' Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives."

No evidence whatsoever was produced by the government to show that the petitioner had any control over the telephone numbers used or the people who answered the telephones or that he paid any bills or salaries as necessarily are incurred in the operation of a business as vast as the government contends the defendant was engaged in.

The language has a clear, definite and well established meaning in our laws in the decisions of our courts and in everyday usage. The term "business" as used in the Internal Revenue Code was first defined by the Supreme Court of the United States in *Flint* v. *Stone Tracy Co.* (1910), 220 U.S. 107, 171, 55 L. Ed. 389, 421, as follows:

> " 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People ex rel. Hoyt v. Tax Comrs., 23 N.Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict. p. 273."

That definition by the Supreme Court was later repeated, affirmed and enlarged by the Supreme Court of the United States in *Von Baumbach* v. *Sargent Land Co.* (1916), 242 U.S. 503, 514, 61 L. Ed. 460, 467, as follows:

> "Were the respondents carrying on business, within the meaning of the Corporation Tax Act? This question was dealt with by this court in the first of the Corporation Tax Cases, Flint v. Stone Tracy Co., 220 U.S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. As the tax was there held to be assessed upon the privilege of doing business in a corporate capacity, it became necessary to inquire what it was to do business, and this court adopted with approval the definition judicially approved in other cases, which included within the comprehensive term 'business' 'that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.'"

It is essential that the Court construe 26 USC §4411 and 26 USC §4412(a) to resolve the questions presented pertaining to whether the collector whose only duty is to collect or pay money after the racing event has taken place is subject to the provisions thereof and therefore warrant a review by this Court.

CONCLUSION

For all of the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS L. GIORDANO
Member of the bar of the
Supreme Court of the United States
Attorney for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No 50—September Term, 1966.

(Argued September 28, 1966 Decided October 4, 1966.)

Docket No. 30504

UNITED STATES OF AMERICA,

Appellee,

—against—

SAM ROSENZWEIG,

Appellant.

Before:

MOORE, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal from a judgment of conviction on two counts for violations of 26 U.S.C. §7203 (failing to register with the District Director of Internal Revenue for being connected with the business of accepting wagers as required by 26 U. S. C. §4412(a)) and 26 U. S. C. §7262 (failing to pay the special tax imposed by 26 U. S. C. §4411 on those receiving wagers). Judgment was entered after a non-jury trial before Leo F. Rayfiel, *Judge,* United States District Court for the Eastern District of New York,

Affirmed.

FRANCIS L. GIORDANO, Brooklyn, New York (Charles T. Drago, Brooklyn, New York, on the brief), *for appellant.*

RAYMOND BERNHARD GRUNEWALD, Assistant United States Attorney for the Eastern District of New York (Joseph P. Hoey, United States Attorney for the Eastern District of New York, Brooklyn, New York, on the brief), *for appellee.*

PER CURIAM:

The Government, after showing that appellant, Sam Rosenzweig, had failed to pay the tax prescribed by Section 4411 of the Internal Revenue Code, 26 U. S. C. §4411, and had failed to register his name and place of residence as prescribed by Section 4412(a) of the Code, 26 U. S. C. 4412(a), presented five witnesses who all testified that they had had conversations with appellant concerning wagers on horses; that appellant had furnished them with telephone numbers and code names to enable them to place bets; and that after the races on which they had bet, they met with appellant at specified times and either paid him the money they had lost or collected from him their winnings. The witnesses testified further that they knew of no one else who was connected with their wagers, and that when they placed their bets by telephone, they identified themselves with their initials and appellant's name, e.g., "E. B. for Sam [appellant]." Cross examination established that appellant did not personally receive any of these telephone calls. There was further testimony to the effect that appellant

was familiar with the requirements of the Internal Revenue Code.

Appellant took the stand and admitted settling accounts with the above five witnesses, but denied that he was acting on his own behalf. He testified that he was performing the said functions for one Slackman and that he was not reimbursed for his troubles. He denied having "accepted" any wagers and further denied having any proprietary interest in the bookmaking business of Slackman. Judge Rayfiel termed appellant's testimony as unworthy of belief.

Appellant argues that, under the terminology adopted by the Supreme Court in *United States* v. *Calamaro*, 354 U. S. 351 (1957), he was a mere "pick-up man" and was consequently not subject to the special tax and did not come within the special registration provisions of the Code. This Court has recently held that direct evidence of a proprietary interest in a gambling scheme is not necessary to hold a defendant subject to the instant Code sections. *United States* v. *Marquez*, 332 F. 2d 162 (2d Cir.), *cert. denied*, 379 U. S. 890 (1964). We believe that the evidence introduced by the Government was clearly sufficient to establish that appellant was more than a mere "pick-up man" and was thus guilty of non-compliance with Sections 4411 and 4412(a) of the Code.

Affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of October one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAM ROSENZWEIG,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

No. [illegible]

In the Supreme Court of the United States

October Term, 1967

SAM ROSENWEIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 745

SAM ROSENZWEIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in a two-count indictment with failing to pay the tax imposed by 26 U.S.C. 4411 and with wilfully failing to register as required by 26 U.S.C. 4412 (A. 4–5). He was convicted in a non-jury trial (A. 146–148). On March 28, 1966, he was sentenced to pay a fine of $2,000 on the first count and to imprisonment for one year on the second count. The sentence of imprisonment was suspended and he was placed on probation for eighteen months (A. 2–3).

The evidence showed that five persons placed bets by calling the telephone numbers furnished by peti-

239-531—66

tioner (A. 11, 42, 67–68, 77, 93). The bettors would give their names, place their bets and say "for Sam" (A. 12, 46, 60, 78). At intervals they also met petitioner and settled their wagering accounts with him (A. 16, 47–48, 70, 81, 89–90).

In his own defense, petitioner admitted that he had settled the wagering accounts but claimed that he acted gratuitously for a bookmaker named Slim Shackman (A. 114–126). A reluctant government witness had testified that on occasion a man named "Slim" had also given her a telephone number for wagering purposes (A. 91).

The only issue raised by petitioner—that he was not engaged in the business of accepting wagers—has no substance.[1] His relationship with the five bettors, which included paying and collecting the money won and lost on wagering, furnished ample circumstantial evidence that he was engaged in the wagering business. *United States* v. *Calamaro*, 354 U.S. 351, upon which petitioner relies, is not in point. In that case, it was undisputed that the defendant merely picked up lottery slips after the wagers had been placed and had no property interest in the numbers enterprise. There is accordingly no reason here to disturb the findings of the two courts below.

[1] Unlike petitioners in *Costello* v. *United States*, No. 41, this Term, and the other related cases presently before this Court, petitioner in this case does not assert any Fifth Amendment questions as to the constitutionality of the wagering tax laws under which he was convicted; nor did he preserve his right to do so by raising such questions in the courts below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

Supreme Court, U.S.
FILED
DEC 5 1966
JOHN F. DAVIS, CLERK

No. 835 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CASSIMIRR AUGELLO, ALSO KNOWN AS CASEY AUGELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Atlantic City, N. J.
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INDEX.

	PAGE
Petition	1
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reason for Granting the Writ	4
Conclusion	5

CASES CITED.

McClure v. *United States*, 332 F. 2d 19 (9 Cir. 1964)	2, 4
McDonald v. *United States*, 335 U. S. 451	4
United States of America, ex rel, Richard J. Manducci v. *Jack Tracy, Warden*, 350 F. 2d 658 (1965) (3 Cir. 1965)	5

STATUTES.

28 U. S. C. sec. 1254 (1)	2
18 U. S. C. sec. 3109	2, 4
26 U. S. C. sec. 7262	2, 4
26 U. S. C. sec. 4401	3
26 U. S. C. sec. 4412	3

APPENDIX A.

Opinion, U. S. D. J. for District of N. J.	6
Opinion, 2nd Circuit Court of Appeals	6

APPENDIX B.

18 U. S. C. 3109	10
26 U. S. C. 7262	10

No.

In The

Supreme Court of the United States

October Term, 1966

CASSIMIRR AUGELLO, Also Known as CASEY AUGELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Cassimirr Augello, also known as Casey Augello, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on November 4, 1966.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey is set forth in Appendix A hereto, infra, page 6.

The opinion of the Court of Appeals for the Third Circuit is printed in Appendix A hereto, infra, page 6.

JURISDICTION.

The opinion of the Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey was filed on November 4, 1966.

The jurisdiction of this Court is invoked under 28 U. S. Code § 1254 (1).

QUESTIONS PRESENTED.

1. Whether within the meaning of 18 U. S. C. § 3109 the standards set down in *McClure* vs. *United States*, 332 F. 2d 19 (9 Cir. 1964) which involved narcotics are equally applicable to the present case involving bookmaking.

2. Whether within the meaning of 18 U. S. C. § 3109, standards set down involving violent or perniciously dangerous offenses are equally applicable in non-violent cases.

STATUTES INVOLVED.

The following statutes are set forth in Appendix B, infra, page 10:

18 U. S. C. 3109
26 U. S. C. 7262

STATEMENT OF THE CASE.

On June 4, 1964, a search warrant was issued by U. S. Commissioner Charles Rudd authorizing a search of premises in which petitioner resided.

On June 11, 1964, some eight Federal Agents (the Circuit Court Opinion indicates five) entered the premises.

The United States District Court for the District of New Jersey later found that the front screen door was locked but the solid door behind it was open; that one of the agents announced himself and requested the door be opened; that petitioner's sister called out "Casey, Casey" whereupon one of the agents put the heel of his hand through the screen, lifted the latch and entered the living room.

The Court found that the time between the arrival of the agents at the door and entry was about five (5) seconds.

The search that followed revealed paraphernalia essential to the Government's case.

On December 29, 1964, a three count information was filed against Petitioner charging that the defendant engaged in the business of accepting wagers and was liable for the tax imposed by 26 U. S. C. § 4401 and

I. did fail to pay the tax
II. did wilfully fail to pay the tax
III. did wilfully fail to supply registration information (26 U. S. C. 4412)

On January 15, 1965, Petitioner pleaded not guilty to all counts and on February 12, 1965 moved to suppress the evidence obtained in the search on the ground that execution of the search warrant was unreasonable.

On July 13, 1965, a hearing was held on the motion to suppress and the motion was denied by the United States District Court for the District of New Jersey.

On September 15, 1965, defendant waived trial by jury in the United States District Court and was tried before the Honorable Thomas M. Madden, Chief Judge.

On March 4, 1966, the Court found the defendant guilty on Count I of the information—failure to pay a special tax on wagering operations in violation of 26 U. S. C. § 7262. He was acquitted on Counts II and III.

On April 1, 1966, defendant was sentenced to pay a fine of $3,000.00.

On April 11, 1966, defendant-petitioner appealed to the United States Circuit Court of Appeals for the Third Circuit which heard argument on October 7, 1966.

On November 4, 1966, the judgment of the United States District Court for the District of New Jersey was affirmed.

The filing of this Petition followed.

REASON FOR GRANTING THE WRIT.

The question raised here is the interpretation of "refused admittance" in 26 U. S. C. § 3109.

The Court of Appeals stated that the present case is indistinguishable from *McClure* vs. *United States,* 332 F. 2d 19 (9 Cir. 1964).

We agree that in both *McClure* vs. *United States* and the instant case, the time elapsed between the officers' arrival at a door and entry was about 4 or 5 seconds. In the *McClure* case, however, we are dealing with the perniciously dangerous matter of narcotics and the danger of destruction of evidence.

In the instant case, the number of agents involved, the non-violent nature of the matter and the fact the petitioner-appellant had no previous record would seem to indicate that an entry in 5 seconds was not reasonable. The instant case does not seem comparable to the *McClure* case.

This Court in *McDonald* vs. *United States,* 335 U. S. 451 stated that suppression of non-violent enterprises should not be viewed as more important than protection against unreasonable search and seizure.

The Third Circuit Court itself has indicated that such swift entry would be allowed only where exigent circumstances were shown.

United States of America, ex rel, Richard J. Manducci vs. *Jack Tracy, Warden*, 350 F. 2d 658 (1965) (3 Cir. 1965).

CONCLUSION.

For the reason stated it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

PATRICK T. MCGAHN, JR.

APPENDIX A.

Opinion of the United States District Court for the District of New Jersey:

The Court: The Court finds, under all of the facts and circumstances here, that the defendant was during the month of June, 1964, in Atlantic City, engaged in the business of accepting wagers without having the special occupational tax stamp, and, consequently, he is guilty under the first count of the indictment.

The Court does not find the element of wilfulness or proof of the element of wilfulness present which is necessary to convict him under counts Nos. 2 and 3 of the information, and, consequently, the defendant stands acquitted on those two charges.

Opinion of the United States Court of Appeals, Third Circuit:

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 15922.

UNITED STATES OF AMERICA.

vs.

CASSIMIRR AUGELLO, ALSO KNOWN AS CASEY AUGELLO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued October 7, 1966.

Before FORMAN, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT.

(Filed November 4, 1966.)

By FORMAN, *Circuit Judge.*

Appellant Cassimirr "Casey" Augello, after waiver of trial by jury in the United States District Court for the District of New Jersey, was convicted of one count of a three count indictment charging him with failure to pay a special tax on wagering operations in violation of 26 U. S. C. § 7262. The principal ground of error asserted is that the District Court erred in failing to suppress evidence seized during the execution of an arrest warrant and search warrant in alleged violation of 18 U. S. C. § 3109.

Agents of the Internal Revenue Service received information from a reliable confidential informant that the appellant was operating a large bookmaking establishment in his home in Atlantic City, New Jersey. In the two months preceding the issuance of the warrants, a special agent and the confidential informant had placed wagers by calling a phone number listed at appellant's address. Investigation showed that no tax returns or regulation applications had been filed by the appellant or anyone else at that address. On this basis warrants for the arrest of the appellant and for the search of the premises were issued on June 4, 1965.

At approximately 2:30 p. m. on June 11, 1965, five agents of the Internal Revenue Service arrived by car in front of appellant's home. They ran from the automobile, three going to the front door and two to the side door. At this time the appellant's sister and mother were watching television in the living room in the front of the house. Though there was conflicting testimony, the District Court found that the front screen door was locked, but the solid door behind it was open, and that when Agent Sullivan approached the front door he could see directly into the living room where the two women sat. Agent Sullivan gave "a few raps" and said "Federal Officers with a search war-

rant. Open the door." Thereupon appellant's sister stood up and called "Casey! Casey!" and started toward the rear of the house. Agent Druiz tried to open the screen door and found it locked. Supervising Agent Cairone said, "Break it!" Agent Druiz put the heel of his hand through the screen, reached in, lifted the latch, whereupon the agents entered. The time between the arrival at the door and their entry was about four or five seconds. They proceeded down the hallway toward the rear of the house, and found the appellant in the kitchen. The agents thereupon informed appellant that they were federal agents with a warrant for his arrest. Within the next two or three minutes appellant was formally arrested.[1] Substantial incriminating evidence was obtained as a result of the search.

The relevant statute is 18 U. S. C. § 3109 which provides as follows:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant."

The fact that an arrest warrant is also involved here has no special significance since the validity of entry under an arrest warrant is to be tested by standards identical to those in the above statute.[2] Thus we are concerned with three statutory requirements: (1) announcement of authority, (2) announcement of purpose, and (3) refusal of admittance. Since the District Court's specific finding that the first two announcements were made, may not be disturbed, it remains only to consider whether the officers were "re-

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[1] Certain statements taken from the appellant after his arrest were excluded from evidence by the District Court upon a finding that he was not informed of his rights when placed under formal arrest. These are not involved in the present consideration.

[2] McClure v. United States, 332 F.2d 19 (9 Cir. 1964) (assumed without discussion); Sims v. United States, 231 F. Supp. 251 (D. Md. 1964); United States v. Barrow, 212 F. Supp. 837 (E.D. Pa. 1962).

fused admittance." Such refusal is present where it can reasonably be inferred from the actions or inaction of the occupants of the premises to be searched.[3] In *McClure* vs. *United States*,[4] several officers with probable cause to believe the appellant was trafficking in heroin and with appropriate warrants went to the front and rear doors of the premises to be searched. The officers, some with guns drawn, proceeded to the front door, passing a bay window, and as they did so, were observed by the mother of the appellant. One of the agents testified that she began to run. Upon reaching the front door, the agent beat upon it and shouted "We are federal officers and have a search warrant, open up." He then heard footsteps running in the "wrong direction," whereupon he kicked open the door to obtain entrance. The total time between arrival at the door and entry was four or five seconds. The Court validated the legality of the search and commented as follows:

> ". . . The refusal of admittance contemplated by the statute will rarely be affirmative, but will oftentimes be present only by implication. . . . When [the officer] heard footsteps 'running in the wrong direction' he had grounds to believe that his request had been rejected. This is especially so since he had previously noticed one of the occupants of the house begin to run. There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case. But officers are never required to wait until the occupants have flown and thus render a search unavailing and an arrest impossible. We think the circumstances were such as would convince a reasonable man that permission to enter had been refused."[5]

We think that this passage expresses a correct view of the requirements of the statute and that the present case is

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[3] McClure v. United States, note 2 *supra;* Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963).

[4] Note 2, *supra.*

[5] 332 F.2d at 22.

indistinguishable from *McClure*. When, after making their announcement, the officers saw the appellant's sister running away from the door and calling the name of the very person for whose arrest they possessed a warrant, they were justified in making an immediate entry. Thus the District Court was not in error in denying appellant's motion to suppress.

The appellant also makes a claim that the search was invalid because the appellant was not warned of his rights at the time of his arrest. But the search was conducted pursuant to a valid search warrant, and the District Court in fact excluded from evidence all statements of the accused made after his arrest. The judgment of the United States District Court for the District of New Jersey will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

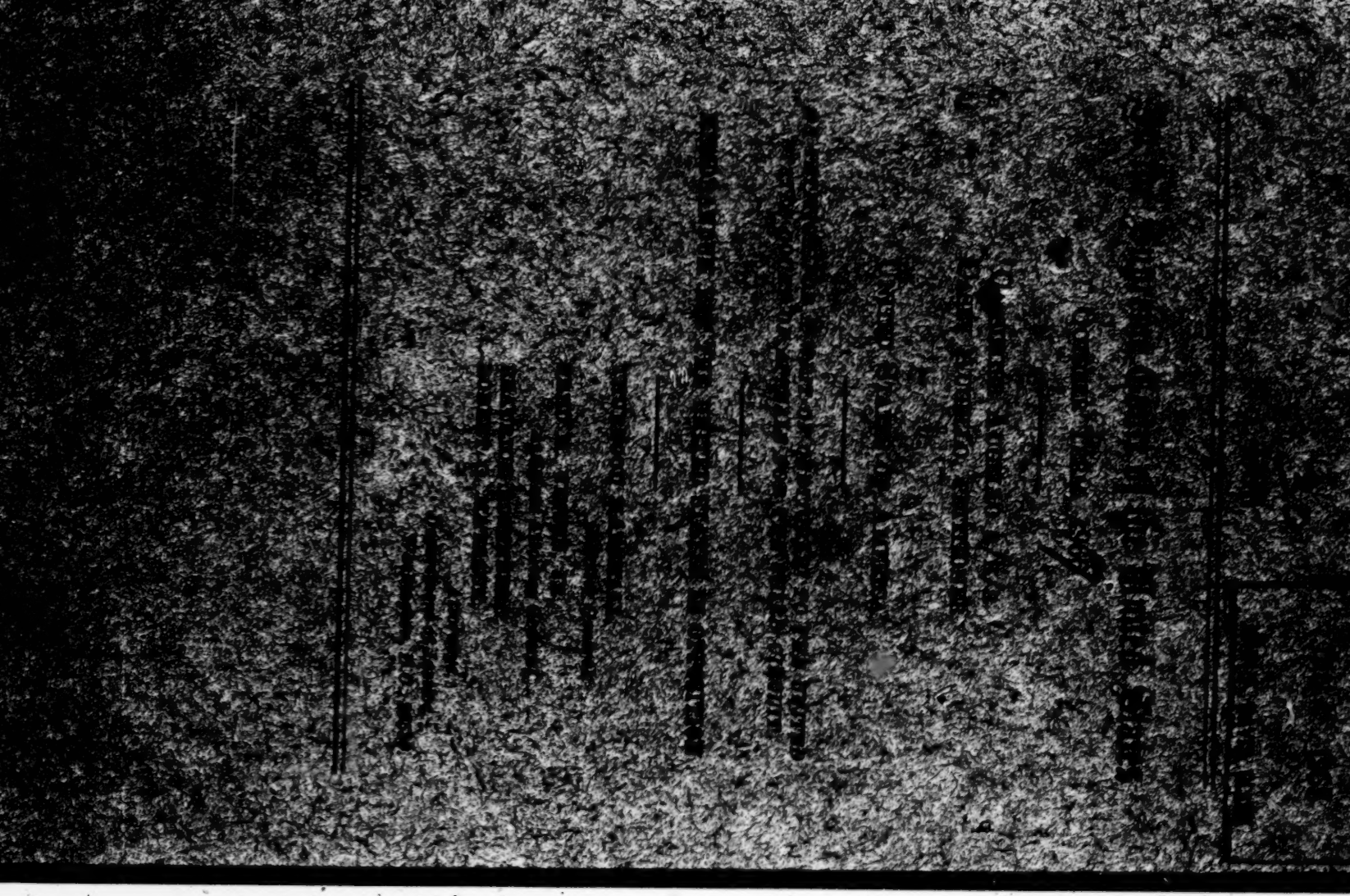
18 U. S. C. 3109:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant."

26 U. S. C. 7262.

Violation of occupational tax laws relating to wagering—Failure to pay special tax:

> "Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000.00 and not more than $5,000.00. August 16, 1954, 9:45 a. m., E. D. T., c. 736, 68A, Stat. 862."



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 835

CASSIMIRE AUGELLO a/k/a
CASEY AUGELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving trial by jury, petitioner was convicted in the United States District Court for the District of New Jersey of failing to pay the special tax on wagering operations in violation of 26 U.S.C. 7262 (R. 2a, 177a). He was sentenced to pay a fine of $3,000 (R. 2a, 179a). On appeal the conviction was affirmed (Pet. App. 7–10).

The sole issue raised is the validity of the execution of arrest and search warrants.[1] Evidence ob-

[1] The constitutionality of the statute, an issue before this Court in *Costello* v. *United States*, No. 41, this Term, was not raised below and is not raised here.

242-317—66

tained thereby was challenged by a pre-trial motion to suppress, which was denied by the district court (R. 104a). The facts may be briefly summarized:

On June 11, 1964, at about 2:30 p.m., agents went to petitioner's premises to execute the search and arrest warrants (R. 70a, 95a). Through the front screen door (the permanent front door being open) the agents saw petitioner's sister and mother in the living room (R. 70–71a, 109a). Agent Sullivan rapped on the door and said, "Federal Officers with a search warrant, open the door." Petitioner's sister thereupon yelled, "Casey! Casey!" and started toward the rear of the house. Agent Drutz discovered that the screen door was locked, and supervising agent Cairone told him to break it. Drutz put the heel of his hand through the screen, reached in and lifted the latch. The three agents then entered (R. 71a, 83a, 109a).[2] The time between the arrival at the door and the entry was no more than five seconds (R. 75a).

Petitioner was arrested in a back room (R. 110a, 144a). In a search of the premises pursuant to the search warrant, the agents seized an adding machine, rundown sheets for horse bets, racing forms and $8,578 in cash. Most of the items introduced in evidence were taken from petitioner's bedroom, which

[2] Defense witnesses testified that the agents made no announcement regarding the purpose of their entry, that the permanent door behind the screen door was closed, and that the agents broke through this door (R. 15a, 29a–30a, 34a, 38a–39a, 48a, 60a). The district judge's findings demonstrate that the judge did not credit the defense testimony (R. 152a).

was near the kitchen (R. 111a–114a, 124a–130a, 7a–8a).

The evidence was sufficient to show that the agents had been "refused admittance," and they were, therefore, justified under 18 U.S.C. 3109 in breaking the screen door to effectuate entry.[2] *McClure* v. *United States,* 332 F. 2d 19 (C.A. 9), certiorari denied, 380 U.S. 945; *Masiello* v. *United States,* 317 F. 2d 121, 122–123 (C.A.D.C.); *United States* v. *Whiting,* 311 F. 2d 191, 194–195 (C.A. 4), certiorari denied, 372 U.S. 935. The women in the house did not indicate that they intended to admit the agents; instead they rushed away from the door and petitioner's sister shouted to him. Her warning may have been calculated to give him time to destroy incriminating evidence, and the agents were justified in taking immediate action.

Petitioner argues that the reasoning of the *McClure* case, *supra,* which involved narcotics, should not be applied to wagering-tax violations. However, the danger that instrumentalities of crime (*e.g.,* gambling paraphernalia and adding machine tapes) will be destroyed is as great in gambling as in narcotics cases. *E.g., DeCesare* v. *United States,* 356 F. 2d 107, 108 (C.A. 5) (incriminating evidence burned in gambling tax case); *Masiello* v. *United States,* 317 F.

[2] 18 U.S.C. 3109 provides: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant."

2d 121, 122 (C.A.D.C.) (numbers slips on "flash paper" burned). The trial court noted that "it takes only seconds to flush sheets of paper down a hopper where they are lost; it only takes seconds to put a match to highly inflammable paper, and then it is lost; it only takes seconds to wet certain types of paper with our new modern and scientific products to have all the writings disappear therefrom, and as evidence they are lost" (R. 103a).

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

JAN 25 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966

No. ~~1001~~ 45

BEN GENNARO,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

ROBERT J. O'HANLON and
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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	7
Conclusion	9
Appendix:	
Opinion	11
Judgment	25

CITATIONS.

Cases:

Tatum v. U. S., 190 F. 2nd 612	8
U. S. v. Calamaro, 354 U. S. 351, 77 S. Ct. 1138	7
U. S. v. Indian Trailer Corp., 226 F. 2nd 595	8
U. S. v. Phillips, 217 F. 2nd 435	8

Statutes:

26 U. S. C., Section 4411	2, 7
26 U. S. C., Section 7203	3
26 U. S. C., Section 7262	3

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. .....

BEN GENNARO,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 1, 1966.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) has not been reported as yet.

JURISDICTION.

The judgment of the Court of Appeals was entered December 1, 1966 (Appendix, infra). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

The question presented is whether, in the trial of a case involving violations of statutes imposing a tax on persons engaged in the business of accepting wagers, the District Court committed reversible error in failing to give the jury appellant's tendered instructions requiring a finding of a "proprietary interest in a bookmaking operation".

STATUTES INVOLVED.

26 U. S. C. 4411 provides:

"(a) **Requirement.**—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district. . . .

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) **Firm or Company.**—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) **Supplemental Information.**—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supple-

mental information from any person required to register under this section as may be needful to the enforcement of this chapter."

26 U. S. C. 7262 provides:

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

26 U. S. C. 7203 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be finded not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE.

Petitioner appealed from a judgment of conviction entered on January 31, 1966, in the United States District Court for the Eastern District of Missouri, upon a verdict finding appellant guilty on two counts of a two count information of violating statutes imposing tax on persons engaged in business of accepting wagers.

The first count in the information charged:

"That during the taxable year July 1, 1964 through June 30, 1965, in the Eastern Division of the Eastern

District of Missouri, Ben Gennaro was willfully and knowingly engaged in the business of accepting wagers as a bookmaker, without having paid the occupational tax imposed by Section 4411, Title 26, United States Code. In violation of Section 7262, Title 26, United States Code."

The second count in the information charged:

"That during the taxable year July 1, 1965 through June 30, 1966, in the Eastern Division of the Eastern District of Missouri, Ben Gennaro was willfully and knowingly engaged in the business of accepting wagers as a bookmaker while willfully and knowingly failing to pay the occupational tax imposed by Section 4411, Title 26, United States Code. In violation of Section 7203, Title 26, United States Code."

On February 11, 1966, the Court sentenced appellant to pay a fine of $1,000 in Count 1 and sentenced him to imprisonment for a term of six months and a fine of $1,000 in Count 2.

The evidence on behalf of the Government was as follows:

The appellant operated Benny's Bar, 1028 Chouteau, in St. Louis, Missouri. On June 3, 1965, U. S. Treasury Agent, Jack Wallace, telephoned the bar and placed nine bets on horses with appellant. On June 4, 1965 he went to the bar and met Ben for the first time (T. 8 to 10), gave him $100.00 "as a deposit for future action" and met his partner Bob William (R. 12). While talking with Ben the telephone rang and appellant, during the course of an ensuing telephone conversation, wrote a name and some figures on a piece of paper (R. 13). Thereafter, over the next several weeks, Agent Wallace placed a number of bets over the telephone with Gennaro (R. 15 to 17). On July 12, 1965, he gave $105.00 to appellant

and again on July 17th he gave him $65.00 "for back bets and deposit (R. 18-19)." He also informed Ben that he was going out of town for awhile and would phone bets to him (R. 18). At that time Gennaro said he was going to be able to obtain parlay cards in the fall and that Agent Wallace could have a minimum order of 500 at five cents each (R. 19-20). Following this more bets were placed by telephone from Minneapolis and from Iowa (R. 21). At the time of the telephone call from Iowa, Agent Wallace asked Gennaro, "if he had purchased a $50.00 wagering tax stamp." Gennaro replied that "he hadn't; that the stamp was only $50.00, it was worth it to keep the 'Feds' off your back, but the minute you bought one, the State knew what was going on (R. 21-22)."

On October 4th, Agent Wallace met with appellant at a tavern and Gennaro invited Wallace to go into partnerships with him on parlay cards for $2500.00. He said the cards would be sent down from Chicago to East St. Louis, that another man would bring them to St. Louis, that 15 or 20 people would distribute them and they would "split the wins" (R. 24-26).

Following this more bets were placed on horse races and baseball games, the last bet being on October 20, 1965 (R. 29).

Special Agent Raymond S. Offutt testified that on November 12th he entered Benny's Bar with a search warrant, identified himself and asked the appellant if he had a Federal Gambling Stamp. Gennaro replied that he did not (R. 29-52). He placed appellant under arrest and confiscated a Football, Basketball and Hockey Schedule which Agent Offutt identified as a "line or result sheet" (R. 54), and a sheet containing a "summation of bets made by people" (R. 55), plus a "bet tab" taken from Gennaro's shirt pocket (R. 55).

Bernice McDonald testified that she is employed by the Internal Revenue and is familiar with the wagering tax stamp records and that after a careful search of the files she could find no record of a stamp being paid for by Ben Gennaro for the times involved (R. 61-65).

Defendant did not testify and no evidence was offered on his behalf. He did, however, submit certain instructions. The Court eliminated a portion of each, and gave the remainder.

Appellant's requested instructions 2 and 5 were as follows:

> "Instruction No. 2: The tax involved in this case is what is known as an 'occupational tax'. The term 'occupation' is synonymous with calling, trade, business or professions. 'Occupation' as commonly understood signified the business or activity in which a person engaged in order to secure a living or to obtain wealth.
>
> Instruction No. 5: Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro had a proprietary interest in the bookmaking operation and that he was engaged in bookmaking as an occupation you must find the defendant Gennaro not guilty on Counts I and II of the indictment."

The Court, after making certain changes in the above instructions, and over objection of appellant (R. 67), submitted them as follows (R. 91 and 92):

> "Defendant's Instruction No. 2: The tax involved in this case is what is known as 'occupational tax.' The term Occupation is synonymous with calling, trade, business or profession. 'Occupation' as commonly understood, signified the business or activity in which a person is engaged.

Defendant's Instruction No. 5: Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro was engaged in bookmaking as an occupation, you must find the defendant Gennaro Not Guilty on Counts One and Two of the Indictment."

REASONS FOR GRANTING THE WRIT.

The Court instructed the jury that "a 'Wagering Tax Stamp' must be obtained by making application therefor to the District Director of Internal Revenue and by payment of an occupational tax of $50.00. This is 26 U. S. Code, Sections 4411 and 6091 (R. 88)."

Section 4411 imposes a special tax of $50.00 per year on each person who is engaged in receiving wagers. This section of Title 26 is part of Subchapter B, entitled "Occupational Tax". And in an effort to clarify the term "occupation" appellant submitted instructions No. 2 and No. 5. By these instructions he was attempting to submit to the jury a proper standard by which to determine whether he was "engaged in the business of accepting bets" as contemplated by the statutes.

In construing the occupational tax provisions on persons engaged in the business of accepting wagers, the Supreme Court has held in United States v. Calamaro, 354 U. S. 351, 77 S. Ct. 1138, 1143, that only "writers", "bankers" or those who have a "proprietary interest" in a lottery operation are subject to the taxing statutes, and that therefore only those persons can be held for violation of their substantive provisions. The excise tax applies only to the one who is engaged in the business of accepting wagers as "a principal on his own account". The case holds that the language of the section limits the occupation tax to persons accepting wagers in a contractual sense and does not impose the tax on all the em-

ployees of a gambling enterprise, such as agents or runners.

Appellant's offered instructions wanted to distinguish the entrepreneur who is engaged in the business of accepting wagers from the one who is engaged in receiving wagers for such entrepreneur. Consequently, the appellant's instruction No. 5 asked the jury to find that he had a "proprietary interest in the bookmaking operation". His instruction No. 2 construed "occupation" in reference to the business or activity of securing a living, or a means of obtaining wealth as against accepting bets purely on a social or friendly basis wherein there is no profit.

The question presented, then, is whether in light of the Calamaro decision the District Court committed reversible error in failing to give the jury appellant's tendered instructions requiring a finding of a "proprietary interest in a bookmaking operation."

There can be no question that defendant was entitled to instructions on his theory of the case for which there was any foundation in the evidence, even though he did not present any testimony, and even though the evidence was weak, insufficient, inconsistent, or of doubtful credibility. Tatum v. U. S., 190 F. 2nd 612, 617; U. S. v. Indian Trailer Corp., 226 F. 2nd 595, 598; U. S. v. Phillips, 217 F. 2nd 435, 441.

However, with the deletions made by the Court, the proprietary interest theory of defense was not presented to the jury for their consideration and they were allowed to convict if they believed that the appellant was simply "engaged in bookmaking as an occupation" without any principal-agent distinction being made out.

That the Court of Appeals decided this question in conflict with the Calamaro decision is manifest in the opinion as follows:

"We find no merit to the claim that Calamaro supports an inference or conclusion that the existence of such a (proprietary) interest is an essential element of the offense."

The opinion does acknowledge, however, that Calamaro held:

"The fact remains, however, that Congress did not choose to subject all employees of gambling enterprises to the tax and reporting reqiurements, but was content to impose them on persons actually engaged in receiving wagers."

The question of whether a "proprietary interest" is an essential element of the offense required to be proven beyond a reasonable doubt and requiring the submission of a tendered instruction thereon, is one of importance in the administration of this section of the law. It is of special importance because the question has been decided by a Federal Appellate Court in a way probably in conflict with an applicable decision of the Supreme Court of the United States.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 18,318.

Ben Gennaro, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[December 1, 1966.]

Before VOGEL, Chief Judge, GIBSON, Circuit Judge, and REGISTER, District Judge.

REGISTER, District Judge.

By this appeal Ben Gennaro seeks reversal of a judgment of conviction entered upon a jury verdict finding him guilty on two counts of an information charging violations of federal statutes imposing a tax on persons engaged in the business of accepting wagers. We affirm the judgment as entered by the district court.

Appellant was charged in count one of the information with being ". . . wilfully and knowingly engaged in the business of accepting wagers as a bookmaker . . ." during the taxable year ending June 30, 1965, ". . . without

having paid the occupational tax imposed by Section 4411, Title 26, United States Code," in violation of Section 7262 of that title. Section 4411 imposes ". . . a special tax of $50 per year to be paid by each person who is . . . engaged in receiving wagers . . ." Section 7262 provides, generally, for a penalty in the form of a fine to be imposed on a person found to be in violation of said Section 4411.

Count two of the information charged appellant with having ". . . willfully and knowingly engaged in the business of accepting wagers as a bookmaker while willfully and knowingly failing to pay the occupational tax imposed by Section 4411, . . ." during the taxable year ending June 30, 1966. Section 7203, Title 26, United States Code, provides for certain penalties, including fine or imprisonment, or both, to be imposed upon a person convicted of willfully failing to pay the tax described in Section 4411.

Appellant was sentenced to pay a fine of $1,000 on count one, and to imprisonment for a period of six months, together with a fine of $1,000, on count two.

No evidence was offered during the trial on behalf of the defendant; all the evidence received was offered by the appellee and stands uncontroverted.

The evidence consists of the testimony of two special agents of the Intelligence Division, United States Internal Revenue Service (Agents Wallace and Offutt); the testimony of Miss Bernice McDonald, an employee of Internal Revenue Service and custodian, in the St. Louis office, of records reflecting payment of wagering tax stamps; and a number of exhibits. The record reveals the following facts:

Appellant operated Benny's Bar at 1028 Chouteau Street in St. Louis, Missouri. On June 3, 1965, Agent Wallace telephoned the bar, identified himself as "John

from the Post," and asked for Benny. The person answering identified himself as Benny and during the ensuing conversation Agent Wallace placed nine wagers on horses running at various tracks on that day. The following morning Agent Wallace went to the bar, asked for appellant, identified himself as "John from the Post," and gave to appellant $20 which he owed as a result of the bets placed on the preceding day. He also gave to the appellant $100 in cash as a deposit for future wagers. During this conversation discussion was had concerning the time at which telephone calls should be made in the future, and the correct telephone number. Appellant introduced Agent Wallace to Bob Williams, one of appellant's bar employees, and told Wallace that if he (appellant) was not present at the bar when called, to place any bets with Williams. Thereafter appellant showed Agent Wallace around the bar, kitchen and storeroom, and while in the storeroom appellant answered two telephone calls during which he made notations of names, letters and numbers on a pad. Commencing on June 5, 1965, and continuing through that month, Agent Wallace placed numerous bets with the appellant or with Williams, at the bar. Between June 5 and July 23, 1965, Agent Wallace placed bets with the appellant covering more than 24 different horses and involving at least $170.

On June 17, appellant informed Agent Wallace that he (appellant) was obtaining football parlay cards for the fall season and could supply them to Wallace for five cents each.

On August 16 Agent Wallace called appellant from Iowa and placed a bet on a baseball game. During that conversation Wallace asked the appellant if he had purchased a wagering tax stamp. Appellant replied by stating ". . . .no, he hadn't; that the stamp was only $50.00; it was worth it to keep the 'Feds' off your back, but the

minute you bought one, the State knew what was going on."

Agent Wallace placed wagers with appellant on August 20 and again on October 4. In response to appellant's request, Agent Wallace met with him during the evening of October 4. At that meeting appellant advised Wallace ". . . that he was able to purchase the line or the point spread on football teams through a source out of Chicago if we wanted to buy the line and have our cards printed . . .", informed Wallace regarding details of the operation—concerning cost of the cards, sources thereof, details of their delivery—and that appellant ". . . had maybe fifteen or twenty people lined up that would push or distribute the cards for us. They would draw fifteen per cent of the gross and we would split the net wins." Appellant proposed on this evening that he and Agent Wallace go into business together, on a partnership arrangement, and quoted a price of $2,500 for a one-half interest. Wallace replied that he would think it over and talk with him later. Agent Wallace continued to place wagers with the appellant from time to time, the last occasion being on October 20, 1965.

Agent Offutt testified that on November 12, 1965, he entered Benny's Bar with a search warrant, identified himself, executed the warrant, informed appellant of his constitutional rights, and, after making the required search, arrested the appellant. In response to his question of "Where is your Federal Gambling Stamp", appellant replied that he did not have one and, when asked "Why not?", advised Agent Offutt that he did not need one. During the search Agent Offutt discovered and seized various documents, all received in evidence, and identified as gambling or wagering paraphernalia.

Miss McDonald testified that she was one of those persons having supervision of wagering tax stamp records

of the Internal Revenue Service in its St. Louis district office; that she had searched and examined the records for the fiscal years ending June 30, 1965 and 1966; and that there was no record of a federal wagering tax stamp having been issued to appellant for either of those two years.

The pertinency of the somewhat detailed statement of the evidence becomes apparent in considering the points of error raised by the appellant.

Appellant urges that the trial court erred in failing to give his requested instructions numbers 2 and 5, as submitted by him. The court eliminated a portion of each, and gave the remainder. Instructions 2 and 5, as requested by the appellant, are quoted; the portions eliminated by the trial court are in Italic print:

> "Instruction No. 2: The tax involved in this case is what is known as an 'occupational tax'. The term 'occupation' is synonymous with calling, trade, business or profession. 'Occupation' as commonly understood signified the business or activity in which a person engaged *in order to secure a living or to obtain wealth.*
>
> "Instruction No. 5: Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro *had a proprietary interest in the bookmaking operation and that he* was engaged in bookmaking as an occupation you must find the defendant Gennaro not guilty on Counts I and II of the indictment (sic)."

Appellant argues that the omitted portions of his requests were essential in order that the term "occupation", as used in the statute, be properly defined, and further, that ". . . a finding of a 'proprietary interest' was part of the law of the case." Appellant's brief, p. 6. It is his conten-

tion that only by including the portions omitted would the jury have been given ". . . a proper standard by which to determine whether he was 'engaged in the business of accepting bets' as contemplated by the statutes."

The gist of the charge contained in the first count, and one of the essential elements of the crime charged in the second count of the information, is that appellant was, during the critical periods, willfully and knowingly "engaged in the business of accepting wagers" without having paid the required tax. It was proper, upon appellant's request, for the trial court to instruct the jury that the tax involved was what is known as an occupational tax and to define the term "occupation". The trial court in this case did just that, and instructed that it ". . . is synonymous with calling, trade, business or profession. 'Occupation' as commonly understood signified the business or activity in which a person is engaged." In *Bohn v. United States,* 8 Cir., 260 F. 2d 773, a case in which the appellant was charged, tried and convicted of attempting to evade and defeat wagering excise taxes, error was urged in that the trial court did not give the jury a definition of the words "a person engaged in the business of accepting such wagers." The appellant had not submitted a request for such definition, but this court stated, by Judge Woodrough, at page 778: ". . . we are not persuaded that the court was required to do so. The word 'business' and the phrase 'engaged in business' are of common usage and there is no reason to treat jurors as though they were unfamiliar with them. The question whether appellant was 'engaged in the business' as charged in this case was a question within ordinary understanding of a taxpayer or of a juror." (Citations.) Also see: *Ramsey* v. *United States,* 9 Cir., 245 F.2d 295, 297.

By instruction number 5 the trial court specifically advised the jury members that unless they found beyond a

reasonable doubt that the appellant was engaged in bookmaking as an occupation they must find him not guilty of the charges set forth in the information. A definition of the term "occupation" had previously been given in instruction number 2. Appellant would have the trial court go further and add an additional element to that required by the statute, namely: "*and* had a proprietary interest in the bookmaking operation." The record reveals substantial, credible and undisputed evidence that appellant did have a proprietary interest in the bookmaking operation. It may very well be that, had appellant's counsel informed the trial court of the specific reason why he desired the omitted portion to be given, it would have done so. However, it is our view that the omitted clause was not essential to the instructions, and no error was committed by the omission thereof.

In support of his contentions, counsel for appellant cites authorities to the effect that accepting a single wager does not make one subject to the special tax; that the wagering tax is not intended to cover pools operated at a loss; and that bets of a social or friendly nature are not to be taxed. He argues that instructions 2 and 5, as requested, ". . . aimed at these distinctions and were a part of the law of the case upon which the jury should have determined its verdict." Appellant's brief, p. 8. We agree that the cases cited support the propositions advanced by appellant. However, we have thoroughly examined the record and transcript of evidence in this case and find absolutely no evidence supporting, either directly or by inference, a contention that the wagers placed with appellant were of a social or friendly type, or that his wagering operation was intended to be conducted at a loss, or that he had accepted only a single wager. To the contrary, the evidence undisputably discloses that appellant's wagering activities were not limited to accepting a single bet; that they were not intended to be conducted at a financial loss; and that

they were not of a purely social or friendly type, but were in fact commercial in nature.

The appellant in *United States* v. *Simon,* 7 Cir., 241 F.2d 308, asserted that because there was no evidence from which it could be concluded that the few bets he made were for the purpose of making a livelihood, he could not be deemed to have been engaged in the business of accepting wagers. In rejecting that contention the court therein stated (p. 310):

> "The legislative history of the Act demonstrates that the premise is unsound and that the argument predicated thereon must fail."

And, further:

> "The purpose of the language 'engaged in the business of accepting wagers' was to exclude from coverage of the Act only bets of the 'purely "social" or "friendly" type.' There is no indication that any other type of wager was excluded. Conversely, the language was intended to include wagers accepted by a principal on his own account, irrespective of whether he was primarily or only incidentally engaged in the acceptance of wagers."

Appellant bases much of his argument upon the reasoning found in *United States* v. *Calamaro,* 354 U.S. 351, wherein the Supreme Court held that a "pick-up man" employed in operating a numbers game, who had no proprietary interest in the enterprise and who acted merely as a messenger in transmitting records of wagers from the "writer" to the "banker," was not "engaged in receiving wagers for or on behalf of any person" within the meaning of the pertinent statute. The court specifically noted that the "pick-up man" merely received the *records* of the wagering transaction from the person who had received the wager and transmitted them to the

"banker." Hence, it is, in that type of case, the "writer" and not the "pick-up man" who is "engaged in receiving wagers" within the statutory meaning. The court further noted that the "pick-up man" merely acted as a messenger, received for his services a weekly salary and had no proprietary interest in the wagering enterprise. However, we find no merit to the claim that *Calamaro* supports an inference or conclusion that the existence of such an interest is an essential element of the offense, and that the Government has the burden of proving such interest beyond a reasonable doubt. The court, after considering the legislative history of the statute involved and the contentions of counsel, concluded, at page 357:

> "The fact remains, however, that Congress did not choose to subject all employees of gambling enterprises to the tax and reporting requirements, but was content to impose them on persons actually 'engaged in receiving wagers.'"

An examination of *United States v. Magliano et al.*, 4 Cir., 336 F. 2d 817, also cited by appellant, discloses that the term "proprietary interest" was therein discussed, but in a manner similar to that in *Calamaro*, supra, and does not support his argument made here.

In *Wright et al. v. United States*, 8 Cir., 175 F. 2d 384, the late Judge Sanborn, speaking for a majority of this court, stated, in part (p. 388):

> "We have examined the requests and the charge of the court. The charge we consider entirely accurate, adequate, and eminently fair. Fortunately, a trial judge, in formulating his charge, is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict, that is enough. A charge should be a concise statement of

the claims of the parties, the issues of fact which the jury must decide, and the applicable law."

Having examined the trial court's instructions to the jury in this case, we find them to be "entirely accurate, adequate, and eminently fair."

Appellant strongly urges that the trial court erred in failing to direct a verdict in his favor, with respect to the second count of the information, at the conclusion of the Government's case, for the reason that there is no evidence that his failure to pay the required tax was a "willful" failure.

The pertinent part of the statute involved (Section 7203, Title 26, U. S. C.), provides that "Any person required . . . to pay any . . . tax . . . who willfully fails to pay such . . . tax . . . shall . . . be guilty of a misdemeanor . . ." Appellant contends that even though the evidence in this case was uncontroverted, it was insufficient to support a finding by the jury that his failure to pay the required tax was "willful", as that term is used in the statute. It is his position that "willful" means more than an intentional or voluntary act; that it includes an evil motive or bad purpose directed toward defeating the requirements of the internal revenue laws.

In support of his asserted proposition concerning the correct interpretation of "willful" as used in the statute, appellant cites *United States v. Calamaro,* supra; *Spies v. United States,* 317 U. S. 492; *United States v. Murdock,* 290 U. S. 389; *Edwards v. United States,* 5 Cir., 321 F. 2d 324; *United States v. Palermo,* 3 Cir., 259 F. 2d 872; *Bloch v. United States,* 9 Cir., 221 F. 2d 786; and *United States v. Martell,* 3 Cir., 199 F. 2d 670.

In *Palermo,* supra, the primary issue was the proper standard to be applied in determining "willful" failure to pay income taxes at the time or times required by the applicable sections of the Internal Revenue Code. That

court, in its opinion, carefully considered and referred in some detail to *Spies, Murdock, Martell,* and *Block,* supra. With reference to the proper standard of "willfulness" to be applied therein, the court stated, in part: "Willfulness is an essential element of the crime prescribed by Sec. 145 (a). It requires existence of a specific wrongful intent—an evil motive—at the time the crime charged was committed * * *." In *Edwards,* supra, that court used the following language: " * * * this court has long held that, where the statutory definition of the crime of failure to pay a tax includes the element of willfulness, 'a specific wrongful intent, that is actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence.'" The Court, in *Martell,* supra, in considering the element of "willfulness" as contemplated by the statute, said (p. 672): "A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable." In general, appellant's position with reference to the standard to be applied, finds support in the cited cases. Thus, in this case, in which the appellant concedes that the undisputed evidence established his liability for the subject tax, knowledge of the federal taxing requirements and of his obligation, and his intentional failure to pay, the question before us is whether the evidence supports the jury's finding that such failure was willful, when the proper standard has been applied thereto. Are there factors present in the evidence which, directly or by inference, establish the "evil motive," "specific wrongful intent" or "bad purpose"—requisite elements of "wilfulness" as used in the statute?

Appellant insists that the only evidence bearing on this point is the "direct evidence" consisting of his reply

to Agent Wallace's inquiry as to whether he had a wagering stamp; that is, that he did not have a stamp, that it was worth the purchase price of the stamp ($50) to keep the "Feds" off his back, but the minute he would buy one, the state knew what was going on. Appellant contends that this evidence establishes that his only motive in failing to obtain the federal stamp was to prevent the State of Missouri from learning of his wagering activities. While such evidence does indicate that appellant's failure to purchase the federal wagering stamp was motivated by a desire to conceal his bookmaking activities from state authorities, it does not conclusively establish that this was his *only* motive. In *Spies,* supra, at page 499, the court stated:

> "If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

And in *Magliano,* supra, 336 F. 2d, at pages 820-1, the court said:

> "It may well be that Trotta's failure to procure the tax stamp and comply with the federal revenue laws was motivated primarily by fear of criminal prosecution under state statutes, but a finding of willfulness does not depend upon a determination of predominant motivation. * * * Evidence of knowledge of the requirements of the taxing statutes, combined with proof of failure to pay the tax . . . furnishes a basis for a finding of willfulness."

Furthermore, it is clear that the "direct evidence" referred to by appellant is not the *only* evidence bearing on the issue of his willfulness, but that there exists in the record a substantial amount of circumstantial evidence which merited consideration.

In *Wilson v. United States,* 9 Cir., 250 F. 2d 312, 325, a case in which the court had under consideration the meaning of the term "willful" as used in a criminal revenue statute, is found the following language:

> "Whether particular conduct is 'willful' is, of course, a question of fact. By its very nature, it is not generally amenable to direct proof and must be shown by circumstantial evidence."

We deem it unnecessary to quote specific portions of the evidence, but, in general, we note those portions thereof which showed the furtive manner in which the wagering relationship between appellant and Agent Wallace was formed, the appellant's handling of his wagering transactions in such a manner as ". . . to avoid making the records usual in transactions of the kind, . . .", his denial of tax liability and obligation to Agent Offutt, and other affirmative acts and conduct of appellant in the course of his wagering business, ". . . the likely effect of which would be to mislead or to conceal" (*Spies,* supra p. 499) its nature and existence from the federal authorities as well as from the state officials. Moreover, such circumstantial evidence is not necessarily outweighed by the "direct evidence" referred to.

> "The argument is also made that circumstantial evidence should not be permitted to outweigh direct evidence. There is, however, nothing magical or sacrosanct about direct testimonial evidence as opposed to circumstantial evidence, especially when it comes from one who is implicated by the circumstances in the . . . (activity) . . . he seeks to deny." *United States v. Gordon,* 3 Cir., 242 F. 2d 122, 126.

The inferences were for the jury. We are satisfied that the jury could have found (and did so find) that certain affirmative acts and conduct of the appellant, as disclosed by the evidence, reasonably supported an inference of

willfulness and that such acts and conduct were prompted in part, at least, by tax evasion motives. Further, we are satisfied from our examination of the record in this case that this issue was properly submitted to the jury and that appellant's guilt ". . . has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." *Bollenbach v. United States*, 326 U. S. 607, 614.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment.

United States Court of Appeals
for the Eighth Circuit.

No. 18,318. September Term, 1966.

Ben Gennaro,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

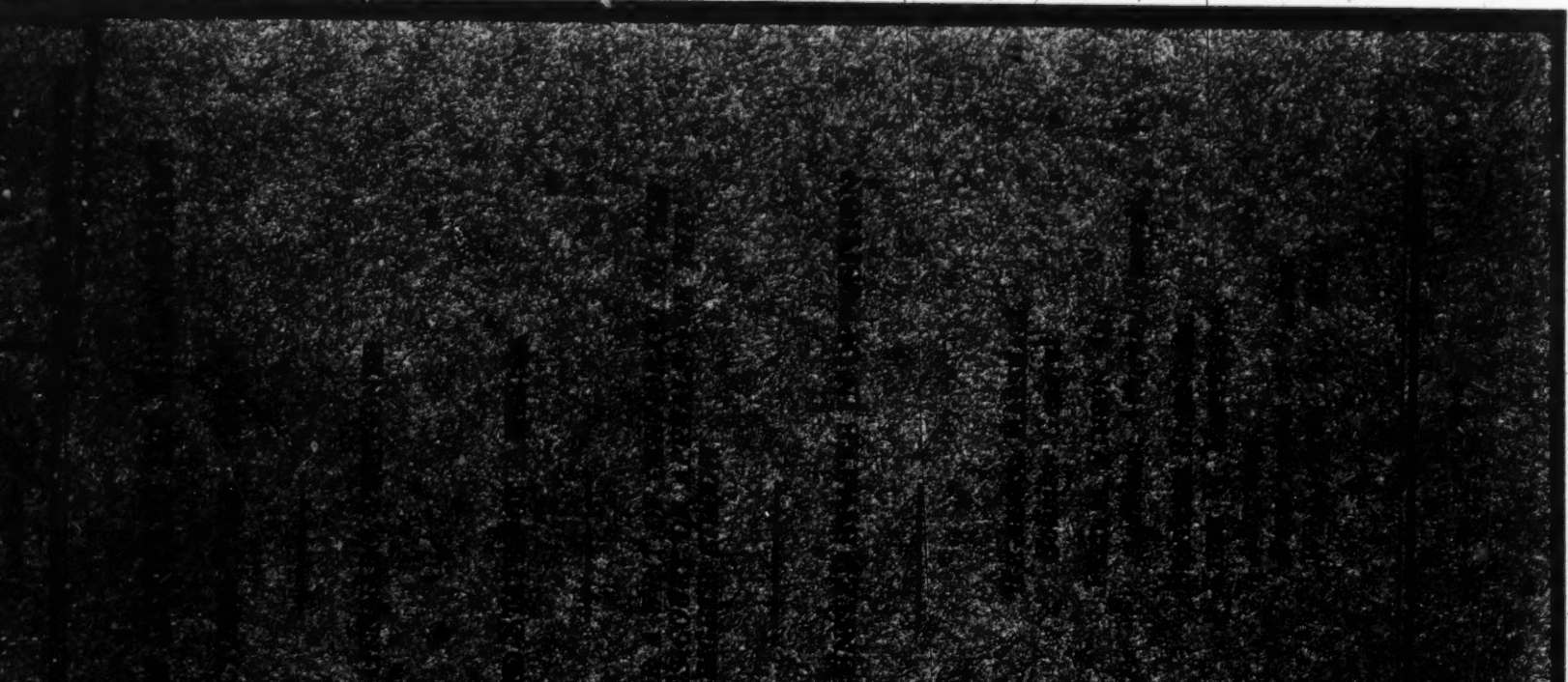
On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered and Adjudged by this Court that the defendant in the said District Court, Ben Gennaro, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

December 1, 1966.

Ordered entered in accordance with Opinion:

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1001

BEN GENNARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11) is reported at 369 F.2d 106.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1966. The petition for a writ of certiorari was filed on January 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for failure to pay the tax imposed on persons engaged in the business of wagering, the judge, in defining "occupation", erred by not requiring the jury to find specifically that petitioner had "a proprietary interest in a bookmaking operation."

STATUTES INVOLVED

26 U.S.C. 4411 provides as follows:

> There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. 4401(c) provides in pertinent part:

> Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

26 U.S.C. 7262 provides as follows:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

26 U.S.C. 7203 provides in pertinent part:

> Any person required under this title to pay any estimated tax or tax * * * who willfully fails

to pay such estimated tax or tax * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Missouri, petitioner was convicted of (1) willfully and knowingly engaging in the business of accepting wagers as a bookmaker during the tax year 1964-1965, without paying the occupational tax imposed by Section 4411 (in violation of 26 U.S.C. 7262), and (2) willfully and knowingly failing to pay the said tax during the tax year 1965-1966 (in violation of 26 U.S.C. 7203). He was sentenced to pay a fine of $1,000 on the first count and to a fine of $1,000 and six months' imprisonment on the second count (1 R. 15; 2 R. 93-95). The court of appeals affirmed.

The evidence showed that, in the period from June 3 to October 20, 1965, agent Wallace of the Internal Revenue Service placed numerous bets with petitioner, the operator of a bar in St. Louis (2 R. 10-18, 21-22, 27-29). Petitioner instructed that when he was not in, Wallace could "give his action" to Williams, an employee (2 R. 12). When Wallace said that he would have to be out of the State, petitioner told him it would be all right to call in his "action" (2 R. 16-17). In October petitioner proposed that Wallace operate in partnership with him in the distribution of

football cards and offered to let Wallace buy into his handbook operation for $2,500 (2 R. 22-29). A search under warrant of petitioner's bar resulted in the seizure of various items of gambling paraphernalia (2 R. 53-58).

Petitioner had no federal wagering stamp (2 R. 52, 61-65) although he knew of the federal statute (2 R. 22).

ARGUMENT

The trial court instructed the jury in part as requested by petitioner (2 R. 91):

> The tax involved in this case is what is known as an "occupational tax". The term "occupation" is synonymous with calling, trade, business or profession. "Occupation" as commonly understood signifies the business or activity in which a person is engaged.[1]

He also instructed (2 R. 91-92):

> Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro was engaged in bookmaking as an occupation you must find the defendant Gennaro not guilty on Counts I and II of the indictment.

As originally submitted by petitioner, this instruction would also have required the jury to find that Gennero "had a proprietary interest in the bookmaking operation" (2 R. 67). Petitioner argues that the

---

[1] Petitioner's requested instructions ended with the words "engaged in order to secure a living or to obtain wealth" (2 R. 67).

failure to include that phrase constituted reversible error. It was not, however, necessary to show that petitioner had a proprietary interest in the business, so long as he was engaged in bookmaking as an occupation. A managerial interest would be sufficient. See *United States* v. *Marquez*, 332 F.2d 162 (C.A. 2), certiorari denied, 379 U.S. 890.

Petitioner misapprehends the scope of the decision in *United States* v. *Calamaro*, 354 U.S. 351. There it was held that a "pick-up man" in a numbers operation was little more than a messenger and not within the intended coverage of the statute. In making the distinction between such an individual and a "banker", the Court did point out that the banker has a proprietary interest in the business. That, however, carries no implication that one must have such an interest in order to be engaged in the occupation. The undisputed evidence was that petitioner acted as a principal, not as an employee (as in *Calamaro*) whose duties were limited to the manual transfer of gambling records. Cf. *Evans* v. *United States*, 349 F.2d 653 (C.A. 5). That is the determinative fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

FEBRUARY 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 567

INEZ TYLER BELLINGER MUTCHERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

B. CLARENCE MAYFIELD
910 West Broad Street
Savannah, Georgia 31401
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

INDEX

Opinion Below 2
Jurisdiction 2
Questions Presented 2
Statement of Facts 3
Constitutional Provisions Involved 3
Reasons for Granting the Writ 4
Conclusion 7
Certificate of Service 8
Appendix A—Decision of United States Court of Appeals, Fifth Circuit, April 21, 1967 ..... A1
Appendix B—On Petition for Rehearing, July 3, 1967 ..... A2

CASES

Boyd v. *U. S.*, 116 U.S. 616, 630 5
Henry v. *United States*, 361 U.S. 98 6
Mapp v. *Ohio*, 367 U.S. 643 (1961) 5
Pointer v. *Texas*, 380 U.S. 400 7
U. S. v. *Reynolds*, 345 U.S. 9 6

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment 4, 5
United States Constitution, Sixth Amendment 4, 7
United States Constitution, Fourteenth Amendment 3, 4, 5, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

INEZ TYLER BELLINGER MUTCHERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

INEZ TYLER BELLINGER MUTCHERSON, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals Fifth Circuit, entered in the above styled case on April 21, 1967, affirming the petitioner's convictions and a Motion for Rehearing was filed in the United States Court of Appeals Fifth Circuit within the time provided by law which was denied on the 3rd day of July, 1967, and an Order extending the time to file a petition for Writ of Certiorari was granted on the 31st day of July, 1967, to be extended to and including September 1, 1967.

OPINION BELOW

The Opinion of the Circuit Court of Appeals for the Fifth Circuit in the case is attached hereto as Appendix A, in this petition, and the order denying rehearing marked Appendix "B".

JURISDICTION

The judgment of the Circuit Court for the Fifth Circuit was entered on the 21st day of April. On July 31, 1967, Mr. Justice Black extended the time for filing this petition to and including September 1, 1967.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 2101 (f).

QUESTIONS PRESENTED

1.

Whether the arresting officers' conduct in effectuating the arrest in the instant case, and the subsequent prosecution of INEZ TYLER BELLINGER MUTCHERSON, to the exclusion of RUDOLPH VAUGHN who was arrested with her at the same time and place and under the same circumstances violated the Due Process Clause of the Fourteenth Amendment?

2.

Whether "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" violated as to INEZ TYLER BELLINGER MUTCHERSON, so as to cause the search warrant and the search based thereon to be illegal and to require suppression of evidence seized thereunder.

STATEMENT OF FACTS

On October 17, 1964, treasury agents conducted a raid at 616 West 37th Street, Savannah, Georgia, where INEZ TYLER BELLINGER MUTCHERSON and RUDOLPH VAUGHN were arrested.

This raid was conducted under the authority of a federal search warrant.

Two items peculiar to a bolita operation were seized in the raid. In an upstairs bedroom of the house were found INEZ TYLER BELLINGER MUTCHERSON, and RUDOLPH VAUGHN. During a search of this bedroom, a sheet of paper was found on the bed, on which was written a list of names, and on dresser the agents found an alleged lottery tally sheet listing names and amounts of alleged bolita bets. INEZ TYLER BELLINGER MUTCHERSON and RUDOLPH VAUGHN were then placed under arrest.

INEZ TYLER BELLINGER MUTCHERSON was prosecuted for violating the Internal Revenue Code (3) Counts, and after petitioner's motion to suppress was denied by the District Court, the evidence seized in the raid was introduced on her trial, and petitioner was adjudged guilty and sentenced to one (1) year on each of said counts, the sentences to run concurrently, and fined Five Thousand ($5,000.00) Dollars. RUDOLPH VAUGHN was never prosecuted tho arrested with your petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

REASONS FOR GRANTING THE WRIT

The Court below failed to decide or pass on the validity of the search warrant.

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Mapp v. *Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), held that the Due Process Clause of the Fourteenth Amendment rendered evidence obtained by a search and seizure in violation of the Fourth Amendment inadmissible in a state court as it is in a federal court.

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.
>
> Since the IV Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." (367 U.S. 655).

The opinion of the Court in Mapp, supra, stresses the relationship between unconstitutional seizures and unconstitutional confessions.

> Thus, "Unconstitutional seizures of goods, papers, effects, documents, etc. is said to be tantamount to coerced testimony." 376 U.S. at 656.

The Court further held in citing *Boyd* v. *U. S.*, 116 U.S. 616, 630, considering the Fourth and Fifth Amendments to the United States Constitution as running "Almost into each other." That these Amendments: "Apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacy of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefensible right of personal security, personal liberty and private property . . . breaking into a house, opening the boss' drawers or circumstances of aggravation for any forceful and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or forfeit his goods, is within the condemnation of those amendments".

The Court noted:

> "Constitutional provisions for the security of person or property should be liberally contrued . . . it is the duty of course to be watchful for the Constitutional rights of the citizens and against any stealthy encroachment thereon."

In the case at bar, an affidavit was made by special agent Bill and employee Harris furnished a lengthy catalogue of circumstances none of which was corroborated, the affidavit further stated the affiant knew from a confidential and reliable source that defendant was allegedly operating a lottery among other things.

Where an arrest is purportedly predicated solely upon an alleged communication from a purported but unidentified "reliable informant", the arresting officer becomes the sole judge of the validity of his own arrest. No post-arrest judicial check is afforded and the accused, the trial court, the court of review, and ultimately this Honorable Court are completely precluded from ever determining the actual existence of an informer; in short, whether, in fact, there was probable cause for the issuance of the search warrant. Full and complete disclosure, not concealment and secrecy, should be the guide post. History has taught us that the police cannot be trusted with such serious matters. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *U. S.* v. *Reynolds*, 345 U.S. 9, 97 L. Ed. 727, 734, 73 S. Ct. 528.

"Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." *Henry* v. *United States*, 361 U.S. 98, 104, 4 L. Ed. 2d 134, 139, 80 S. Ct. 168.

From a practical standpoint, disclosure is the only possible method which adequately protects the right of a

citizen in a free society "to be secure in his person . . . against unreasonable searches and seizures."

Nondisclosure, it is submitted, greatly increases the propensity of the arresting officer to give perjured and/or embellished testimony, to say nothing of the proclivities of an informer (assuming there is one) to furnish false leads. Without disclosure, there is no adequate judicial check.

The Sixth Amendment guarantees an accused the rights of confrontation, cross-examination, and compelling witnesses in his behalf. These guarantees have already been held applicable to and binding upon the States. These rights are denied when the prosecution is allowed to cloak in secrecy a purported informer whose supposed communications are offered in any way against an accused.

Under other factual circumstances this Court has held that the Sixth Amendment Confrontation Clause applies, through the Fourteenth Amendment, to the States in a State prosecution:

> "We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Pointer* v. *Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 85 S. Ct. 1065).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

B. CLARENCE MAYFIELD
910 West Broad Street
Savannah, Georgia 31401
Attorney for Petitioner

PROOF OF SERVICE

I, B. CLARENCE MAYFIELD, Attorney for INEZ TYLER BELLINGER MUTCHERSON, petitioner herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that on the 30th day of August, 1967, I served copies of the foregoing petition for a Writ of Certiorari on the party thereto and its attorneys by mailing a copy in a duly addressed envelope with adequate postage prepaid, as follows:

Hon. Allen L. Chancey, Jr.
Assistant U. S. Attorney
Old Post Office Building
Atlanta, Gerogia

Hon. Thurgood Marshall
Solicitor General
Office of the Solicitor General
Washington, D. C. 20530

.....

B. CLARENCE MAYFIELD
Attorney for Inez Tyler Bellinger Mutcherson

APPENDIX

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23954

INEZ TYLER BELLINGER MUTCHERSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(April 21, 1967.)

Before BROWN and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: The appellant was convicted upon three counts charging wagering tax violations under 26 U.S.C.A. 7203. She argues that her convictions should be reversed because of insufficiency of the evidence, illegality of the search of her house, and prejudice of the judge. A consideration of each of these contentions shows them to be entirely without merit.

AFFIRMED.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23954

INEZ TYLER BELLINGER MUTCHERSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

On Petition for Rehearing

(July 3, 1967)

Before BROWN and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

It is ordered that the appellant's motion for rehearing in the above styled cause be hereby DENIED.

Petition for Rehearing filed 6/7/67.

Petition for Rehearing denied 7/3/67.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 567

INEZ TYLER BELLINGER MUTCHERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a non-jury trial in the United States District Court for the Northern District of Georgia of having engaged in the business of wagering without having registered and paid the special tax. She was sentenced to imprisonment for one year and fined $5,000 (R. 223-224). The court of appeals affirmed the conviction (Pet. App. A).

The sole issue raised is the sufficiency of the affidavits for a search warrant under which certain items associated with a bolita operation were taken

from petitioner's premises. The affidavits by internal revenue agents recited that petitioner's former husband had been known as the "king" of bolita in the Savannah area; that one of the agents had received numerous reports that petitioner was continuing the business since his death; and that she and her present husband had been arrested by state officers on bolita charges, the latest in May, 1964. The affidavits further stated that state officers who had conducted a raid had advised the agents that the bolita business was conducted on the second floor of the described building; that in 1961 petitioner and her present husband had been advised of the federal law respecting the tax on wagers and each had acknowledged awareness of the requirements; that the premises at issue were placed under surveillance in September and October, 1964, and a number of persons, including a convicted Bolita writer, were seen to enter with packages or a money bag (R. 186-202); that a special agent who placed bolita bets saw persons with whom he had placed the bets enter the premises; that one such person told him he was writing bets for petitioner (R. 203-208); and that one bet was placed with petitioner's husband as he left the premises under surveillance (R. 203). The affidavits also recited that a search of the records revealed no registration by petitioner or her husband, and no registration by anyone for the premises involved (R. 193).

The affidavits, which set forth detailed facts corroborating the general information that petitioner was engaging in the bolita business, were clearly suf-

ficient under *United States* v. *Ventresca*, 380 U.S. 102.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1967.

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PER CURIAM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DeCESARE ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 11. Decided March 4, 1968.*

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated, and the cases are remanded for further consideration in the light of *Marchetti* v. *United States,* 390 U. S. 39. See also 28 U. S. C. § 2106 and *Grosso* v. *United States,* 390 U. S. 62.

MR. JUSTICE MARSHALL took no part in the consideration or decision of Nos. 11, 17, 19, 24, 30, and 45.

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*Together with No. 17, *Butler* v. *United States;* No. 19, *Brazzell et al.* v. *United States;* No. 24, *Rosenzweig* v. *United States;* No. 30, *Augello, etc.* v. *United States;* No. 45, *Ginnaro* v. *United States;* and No. 567, *Mutcherson* v. *United States,* all on petitions for certiorari. Nos. 17, 19, and 567 are to the Court of Appeals for the Fifth Circuit, No. 24 to the Second Circuit, No. 30 to the Third Circuit, and No. 45 to the Eighth Circuit.